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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

URVASHI B. PATEL, an individual,

Petitioner,

v.

OMH MEDICAL CENTER, INC., an Oklahoma corporation, ST. FRANCIS HOSPITAL, INC., an Oklahoma corporation, Larry D. Henry, an individual and Arrington, Kihle, Gaberino & Dunn, Inc.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Oklahoma

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Was Petitioner deprived of her constitutional right to the equal protection of the laws when the Oklahoma Supreme Court declared that the Respondents in this case were legally entitled to prophylactic immunity from liability to Petitioner for having committed, in concert, extreme acts of fraudulent litigational misconduct in another lawsuit in which Petitioner was the plaintiff and Respondents were the defendants and their attorneys (which misconduct included the intentional fabrication and spoliation of evidence, perjury, defrauding Petitioner, the Trial Judge and the jury therein, on which fraud Petitioner, the Trial Judge and the jury each relied to their detriment) resulting in the destruction of Petitioner's property – her legal claims against such defendants – all of which attorney-complicit fraudulent misconduct was engaged in by Respondents as their sole defense to Petitioner's claims against them, whereas identical and even substantially less egregious, litigational misconduct has long been actionable in Oklahoma if committed by a plaintiff against a defendant, with the Oklahoma Supreme Court offering no rational basis for such differential treatment of defendants, as opposed to plaintiffs?

PARTIES TO THE PROCEEDING

Petitioner, Urvashi B. Patel, was the Plaintiff and the Appellant in the Courts below.

Respondents, OMH Medical Center, Inc., St. Francis Hospital, Inc., Larry D. Henry and Arrington, Kihle, Gaberino & Dunn, Inc., were the Defendants and the Appellees in the Courts below.

There are no other parties to this action.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
A. Proceedings below	3
1. "Patel I."	4
2. Petitioner's Petition to Vacate the Fraudulently-Obtained Judgment – "Patel II"	5
3. Commencement of This Case – "Patel III" – Petitioner's Claim for Money Damages Attributable to Respondents' Fraudulent Litigational Misconduct	6
4. Further Proceedings in Patel II	6
5. Oklahoma's Tort Law of Deceit and Other Willful Injury to the Property of Others Prior to This Case	7
6. The Oklahoma Supreme Court's Decision	8
7. Oklahoma Supreme Court Proceedings in Patel II	10
8. Petitioner's Equal Protection Arguments to the Oklahoma Supreme Court	10
REASONS FOR GRANTING THE WRIT	14

TABLE OF CONTENTS – Continued

Page

I. THE OKLAHOMA SUPREME COURT DENIED PETITIONER THE EQUAL PROTECTION OF THE LAWS IN RULING THAT RESPONDENTS WERE PROPHYLACTICALLY IMMUNE FROM LIABILITY TO HER FOR DESTROYING HER LAWSUIT AGAINST TWO OF THEM THROUGH THE USE OF EXTREME LITIGATIONAL MISCONDUCT INCLUDING FRAUD ON HER, THE TRIAL COURT AND THE JURY WHEREAS SUBSTANTIALLY LESS SERIOUS LITIGATIONAL MISCONDUCT WOULD HAVE GIVEN RISE TO A CLAIM BY A DEFENDANT WHO WAS SUED BY A PLAINTIFF IN OKLAHOMA IN PURSUIT OF HER UTTERLY MERITLESS LEGAL POSITION 15

II. THIS CASE IS OF CRITICAL IMPORTANCE TO THE ADMINISTRATION OF JUSTICE IN THE STATE OF OKLAHOMA 22

CONCLUSION 24

Appendix A Opinion of the Supreme Court of the State of Oklahoma, dated April 27, 1999 ..... 1a

Appendix B Judgment from the District Court of Tulsa County, Oklahoma, filed June 3, 1997 ..... 44a

Appendix C Order of the Supreme Court of the State of Oklahoma denying Petition for Rehearing, filed September 30, 1999 ..... 46a

Appendix D Plaintiff Dr. Patel's Petition for Rehearing and Brief in Support filed May 17, 1999 ..... 47a

Appendix E Original Petition, filed in Tulsa County District Court February 24, 1997 ..... 66a

TABLE OF AUTHORITIES

Page

CASES

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) 20

Brinkerhoff-Farris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) 12, 14, 21

Cooper v. Parker-Hughey, 894 P.2d 1069 (Okla. 1995) 16

Hall v. Goodwin, 775 P.2d 291 (Okla. 1989)..... 3

Hibbard v. Holiday, 58 Okla. 244, 158 P. 1158 (1916) 15

Keel v. Hainline, 331 P.2d 397 (Okla. 1958)..... 7, 17, 18

Levy v. Louisiana, 391 U.S. 68 (1968)..... 14, 19

Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 118 S.Ct. 956 (1998) 20

Mangum Electric Co. v. Border, 101 Okla. 64, 222 P. 1002 (1924)..... 8, 15

Ortiz v. Fiberboard Corp., 119 S.Ct. 2295 (1999)..... 20

Panther v. McKnight, 125 Okla. 134, 256 P. 916, (1927) 15

Park v. Security Bank & Trust Co., 512 P.2d 113 (Okla. 1973)..... 7, 18

Patel v. OMH, 1999 OK 33 1

PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) 13

Richards v. Jefferson Co. Ala., 517 U.S. 793 (1996) 13, 14, 19, 20

Romer v. Evans, 517 U.S. 620 (1996) 14, 19, 20

Saenz v. Roe, 119 S.Ct. 1518 (1999) 14, 20

Schonwald v. Ragains, 32 Okla. 223, 122 P. 203 (1912) 15

TABLE OF AUTHORITIES – Continued

Page

Skinner v. Oklahoma, 315 U.S. 535 (1942) 14, 19
Stebbins v. Edwards, 101 Okla. 188, 224 P. 714 (1924) 15
Voiles v. Sante Fe Minerals, Inc., 911 P.2d 1205 (Okla. 1996) 7, 18
Young v. First State Bank, 628 P.2d 707 (Okla. 1981) 18

STATUTES

Tit. 12 Okla. Stat. 1991 §1031 (Fourth) 5
Tit. 12 Okla. Stat. 1984 §2012(B)(6) 3, 6
Tit. 21 Okla. Stat. 1910 §575 ..... 8, 13, 16, 17
Tit. 76 Okla. Stat. 1910 §2 ..... 7, 13, 15
28 U.S.C. §1257(a) 1

FEDERAL RULES OF CIVIL PROCEDURE

Rule 12(b)(6) 3

CONSTITUTION OF THE UNITED STATES OF AMERICA

U.S. Constitution Amendment XIV, Section I 1

RULES OF THE UNITED STATES SUPREME COURT

Supreme Court Rule 17.1(c) 14

OKLAHOMA UNIFORM JURY INSTUCTIONS CIVIL – 2ND EDITION 1993

OUJI No. 16.6 ..... 11, 18
OUJI No. 16.9 17

OKLAHOMA CONSTITUTION

Article 11, §6 ..... 12, 21

PETITION FOR WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

Dr. Urvashi Patel petitions this Court for a Writ of Certiorari to review the decision of the Supreme Court of the State of Oklahoma in this Case.

OPINIONS BELOW

The Opinion of the Oklahoma Supreme Court (Pet. App. 1a-43a) is officially reported at http://www.oscn.net, 1999 OK 33, and will also be officially reported at ___ P.2d ___ (1999). In that Opinion, the Oklahoma Supreme Court affirmed an unreported Opinion of the District Court of Tulsa County (Pet. App. 44a-45a).

STATEMENT OF JURISDICTION

The decision of the Oklahoma Supreme Court was entered on April 27, 1999. Petitioner's timely Petition for Rehearing and Brief in Support (Pet. App. 47a-65a) was denied by Order entered on September 30, 1999 (Pet. App. 46a). Jurisdiction lies under 28 U.S.C. §1257(a) for this Court to review the final decision of the Oklahoma Supreme Court.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution Amendment XIV, Section I, provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Refusing even to consider the equal protection implications of its decision and failing even to suggest any rational basis for its doing so, the Oklahoma Supreme Court in this case declared Petitioner, and all other plaintiffs similarly situated, barred from the courts of Oklahoma to seek redress for injury caused them by even the most extreme acts of intentional, fraudulent misconduct committed by defendants, and such defendants' attorneys, in a lawsuit, thereby prophylactically immunizing defendants and their attorneys merely because of their status as such: Identical, and indeed substantially less egregious, litigational misconduct, if committed by a plaintiff and/or his attorney against a defendant has long been actionable under the laws of Oklahoma. The result is a ruling that uniquely precludes compensation to plaintiffs, and so uniquely immunizes and favors defendants and their attorneys, in all civil litigation in Oklahoma.

This Court has long held access to a state's courts to seek redress for loss of property to be a fundamental

right, differential access to which by states for various groups of similarly-situated, prospective plaintiffs must be based on at least a rational basis. The gratuitous preference accorded defendants, at the expense of plaintiffs, by the Oklahoma Supreme Court's decision in this case also has the potential fundamentally to undermine the integrity of the judicial process in Oklahoma by fostering the proliferation of misconduct by defendants and their attorneys in Oklahoma's courts.

In short, this case involves an extreme violation of equal protection of the laws by the Oklahoma Supreme Court without any conceivable rational basis supporting its action, in violation of the federal Constitution, this Court's numerous prior rulings and even unambiguous statutes and the Constitution of the State of Oklahoma itself.

A. Proceedings below.

This case arises from the Trial Court's Order granting Respondents' Motion to Dismiss Petitioner's original pleading commencing this case (styled her "Petition" under Oklahoma law), pursuant to Tit. 12 Okla. Stat. 1984 §2012(B)(6) (substantially identical to Rule 12(b)(6) of the Federal Rules of Civil Procedure and applied by the Oklahoma Courts identically to such federal rule. *See* Official Committee Comment to [12 Okla. Stat.] Section 2012; *Hall v. Goodwin*, 775 P.2d 291, 293 (Okla. 1989).) Accordingly, all factual allegations contained in such Petition (Pet. App. 66a-87a) must be presumed to be true.

1. "Patel I."

Petitioner originally sued Respondent OMH Medical Center, Inc. ("OMH"), for breach of contract, and Respondents OMH and St. Francis Hospital jointly for various intentional torts arising out of those Respondents' attempted extortion against Plaintiff (those Respondents threatened to ruin Petitioner's medical career if she refused to waive a $50,000 fee to which, they admit, she was legally entitled, and to foster such career if she agreed to such waiver) ("Patel I"). A jury trial of both such claims in Patel I was held before the Honorable Jane P. Wiseman in February, 1995, resulting in a verdict for Petitioner on her contract claim and for those Defendants on her tort claims. The remaining Respondents in this case – Arrington, Kihle, Gaberino & Dunn ("AKG&D") and Larry D. Henry ("LDH") – were the attorneys for all those Respondents throughout that case.

The entire defense presented by Respondents to Petitioner's tort claims at the trial of Patel I consisted of perjurious testimony from LDH and AKG&D on behalf of all the Respondents in this case and documentary "evidence" despoiled and/or manufactured by all such Respondents, with the active participation of such lawyers, admission of which was obtained only by such Respondents knowingly making material, false representations to Petitioner and Judge Wiseman on which they relied to their detriment. The jury's verdict adverse to plaintiff's tort claims resulted primarily, if not exclusively, from such fraudulent misconduct, including the false, manufactured "evidence" presented by Respondents, and, accordingly, Petitioner was damaged by having her Patel I lawsuit – her chose in action – destroyed

by such intentional, fraudulent acts of Respondents. Such verdict became a final judgment after the Oklahoma Court of Civil Appeals affirmed it and the Oklahoma Supreme Court denied discretionary certiorari review.

2. Petitioner's Petition to Vacate the Fraudulently-Obtained Judgment – "Patel II".

At the time the Patel I Judgment became final, Petitioner had reason to believe, but possessed no evidence supporting such belief, that Respondents had obtained their Judgment adverse to her tort claims based on such fraud practiced on her and on the Trial Judge. Petitioner commenced a new proceeding by filing her Petition to Vacate the portion of the Judgment adverse to her tort claims against the original Defendants ("Patel II"), pursuant to Tit. 12 Okla. Stat. 1991 §1031 (Fourth).[1] In such Petition to Vacate, Petitioner alleged, then on information and belief, some of Respondents' fraudulent misconduct described above. While conducting discovery incident to such Petition to Vacate, Petitioner obtained documentary evidence unambiguously proving Respondents' fraud and evidentiary proof of additional, material frauds also committed by Respondents, also with the active participation of their attorneys.

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[1] "§1031". *District Court, Power To Vacate Or Modify Its Judgments, when* "The District Court shall have power to vacate or modify its own judgments or orders within the times prescribed hereafter: . . . Fourth. For fraud, practiced by the successful party in obtaining the judgment or order. . . . "

3. Commencement of This Case – "Patel III" – Petitioner's Claim for Money Damages Attributable to Respondents' Fraudulent Litigational Misconduct.

Petitioner filed her Petition to commence this case in the Tulsa County District Court on February 24, 1997 (Pet. App. 66a-87a). On March 11, 1997, Respondents filed their Motion to Dismiss such pursuant to Tit. 12 Okla. Stat. 1984 §2012(B)(6). On March 21, 1997, Petitioner filed her Response Brief to such Motion. On June 3, 1997, the District Court granted such Motion to Dismiss "based upon current Oklahoma case authority" (Pet. App. 44a-45a). Petitioner appealed such judgment to the Oklahoma Supreme Court which granted her unusual Motion to Retain Jurisdiction over such appeal.[2]

4. Further Proceedings in Patel II.

Thereafter, on November 14, 1997, Judge Wiseman issued her final Order in Patel II granting Petitioner's Petition to Vacate, expressly finding as an adjudicated fact that Respondents had indeed intentionally committed the material, attorney-complicit fraud on her, Petitioner and the jury alleged in the Patel II Petition to Vacate, which also constituted significant portions of Petitioner's allegations in this case, Patel III. The Defendants in Patel II (also the Defendants in Patel I and some

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[2] Ordinarily, in the absence of such retention, Oklahoma civil appeals are decided in the first instance in the Oklahoma Court of Civil Appeals, reviewable by the Oklahoma Supreme Court only by subsequent discretionary order of Certiorari.

of the Respondents herein) appealed such ruling by Judge Wiseman and the Oklahoma Supreme Court also retained that appeal.

5. Oklahoma's Tort Law of Deceit and Other Willful Injury to the Property of Others Prior to This Case.

Oklahoma has, by duly-enacted statute, long provided a cause of action for anyone who suffers damage due to the willful deceit of another. Tit. 76 Okla. Stat. 1910 §2.[3] The Oklahoma legislature has never provided any exception to liability under this statute where such deceit occurs during the course of litigation. Indeed, on the contrary, Oklahoma law has long rendered plaintiffs and their attorneys liable for any intentional litigational misconduct – fraudulent or otherwise – committed in furtherance of claims against defendants which they know to be unmeritorious, as torts designated malicious prosecution and abuse of process. *Park v. Security Bank and Trust Co.*, 512 P.2d 113 (Okla. 1973); *Voiles v. Sante Fe Minerals, Inc.*, 911 P.2d 1205 (Okla. 1996); *Keel v. Hainline*, 331 P.2d 397 (Okla. 1958) (Aiders and abettors equally liable with principals – clearly applicable to attorneys assisting clients). Additionally, Oklahoma is unique among American jurisdictions in long providing for tort liability whenever a person's property is damaged as a

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[3] Tit. 76 Okla. Stat. 1910 §2, Damages for Deceit, reads as follows:

> "One who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers."

result of any intentional, or criminal, misconduct of another even where such misconduct does not fit into the pattern of any common law tort. *Mangum Electric Co. v. Border*, 101 Okla. 64, 222 P. 1002 (1924); *Patel v. OMH* (Pet. App. 1a-43a).

Moreover, since 1910, the Oklahoma legislature has announced that the public policy of Oklahoma precludes any immunization of liability for lawyers committing any fraud in court by expressly providing treble damages civil liability to persons injured by such misconduct in Tit. 21 Okla. Stat. 1910 §575.[4]

6. The Oklahoma Supreme Court's Decision.

Petitioner brought all these matters to the attention of the Oklahoma Supreme Court. The Oklahoma Supreme Court affirmed the Trial Court's dismissal of Petitioner's

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[4] "Tit. 21 §575, Attorneys, misconduct by – Deceit – Delaying suit – Receiving allowance for money not laid out:

> "Every attorney who, whether as attorney or as counselor, who:
>
> "1st, *is guilty of any deceit* or collusion, or consents to any deceit or collusion *with intent to deceive the court or any party*; or,
>
> "2nd, willfully delays his client's suit, with a view to his own gain; or,
>
> "3rd, willfully receives any money or allowance for or on account of any money which he has not laid out or become answerable for, is guilty of misdemeanor; and, in addition to the punishment prescribed therefor by this code, he forfeits to *the party injured treble damages, to be recovered in a civil action* [emphases added]."

Patel III claims herein against Respondents simply because such claims relate to misconduct by defendants and their attorneys which occurred during the course of litigation (but without purporting to rule *un*actionable equal or lesser misconduct by a plaintiff in furtherance of unmeritorious claims against defendants, under the tort designation of malicious prosecution and/or abuse of process.) The Oklahoma Supreme Court also purported to follow what it claimed was a trend in other states ruling on this question,[5] offered no policy rationale other than the claimed virtue of finality to support its decision and failed even to consider the equal protection implications of its decision.

Thus, in this case, the Oklahoma Supreme Court carved out a unique zone of complete, prophylactic immunity from civil liability for such litigational misconduct reserved exclusively for defendants and their attorneys, shielding them from compensating plaintiffs when they commit even the most egregious acts of misconduct resulting in the destruction of such plaintiffs' lawsuits.

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[5] As shown in Petitioner's Petition for Rehearing in this case (Pet. App. 47a-65a), no such "trend" disallowing liability prophylactically for the Respondents' misconduct described in the Patel III Petition (Pet. App. 66a-87a) exists among the various states and no other state Supreme Court has purported to rule that the position of the Oklahoma Supreme Court – completely disallowing liability for such misconduct by defendants and their attorneys, but not for plaintiffs – would pass equal protection muster.

7. Oklahoma Supreme Court Proceedings in Patel II.

The Oklahoma Supreme Court announced its decision in this case in the same Opinion in which it decided the appeal of those Respondents in this case who were also Defendant-Appellants in Patel II, but without formally consolidating such cases (Pet. App. 1a-43a). The Oklahoma Supreme Court reversed Judge Wiseman's Patel II Order vacating the Patel I Judgment, but without disturbing her fact finding of Respondents' material fraud on her, Petitioner and the jury. Instead, it ruled such attorney-complicit fraud insufficient for such relief and remanded the case to Judge Wiseman to make additional findings prior to vacating the Patel I Judgment. Petitioner filed a Petition for Rehearing in the Oklahoma Supreme Court in Patel II, which Petition was denied in the same Order denying the Petition for Rehearing in this case, in both cases over two dissenting Oklahoma Justices. (Pet. App. 46a). On even date herewith, Petitioner is also filing a Petition for Writ of Certiorari to the Supreme Court of Oklahoma in Patel II, Case No. ___, styled *Urvashi B. Patel, an individual, Petitioner v. OMH Medical Center, Inc., an Oklahoma corporation, St. Francis Hospital, Inc., an Oklahoma corporation, and John B. Stevens, an individual, Respondents,* based on the Oklahoma Supreme Court's violation of Petitioner's right to due process in its ruling in that case.

8. Petitioner's Equal Protection Arguments to the Oklahoma Supreme Court.

Under Oklahoma's appellate procedure, Petitioner was not permitted to file any brief in the Oklahoma

Supreme Court other than to resubmit the identical brief which she had previously filed in the District Court. Petitioner first brought the federal, equal protection question involved in this Certiorari Petition to the attention of the Oklahoma Courts in her Petition for Rehearing and Brief in Support which she timely filed in the Oklahoma Supreme Court following its decision affirming the District Court's dismissal of her claims (Pet. App. 47a-65a). Petitioner did so by including in such Petition for Rehearing the following argument:

> "Even more importantly, although the [Oklahoma Supreme] Court states [in its Opinion in this case] that the misconduct alleged in the Patel III Petition [involved herein] has never previously been held actionable, it is absolutely clear that if *identical* – or even substantially *less* culpable – misconduct were committed by a *plaintiff* in pursuance of *her* unmeritorious legal claims, rather than by defendants, as here, such misconduct would indeed be actionable independently by the injured party as an essential part of a suit for malicious prosecution and/or abuse of process. *See* OUJI [Oklahoma Uniform Jury Instructions – Civil (2nd Edition 1993) adopted by Order of the Oklahoma Supreme Court SCAD-93-3, February 26, 1993)] Instruction No. 16.6, providing that malice is shown for such purpose when an "action [that is, a case has] "been done . . . willfully in a wanton or oppressive manner, and in conscious disregard of the other's rights." If the blatant, fraudulent misconduct described in the Patel III Petition, all of which, as described therein, was conducted in pursuit of an utterly meritless legal position,

does not satisfy that instruction's test, what does?

"It is indisputable that a plaintiff whose litigation rights are destroyed through the attorney-complicit litigational misconduct alleged in the Patel III Petition suffers *both* a public *and* a private injury *identical* to that of such a defendant who is subjected to litigation misconduct by a plaintiff sufficient to give rise to such long-standing torts. Why should defendants be given free access to the courts for identical, though *lesser*, misconduct, while plaintiffs are, under the Court's Opinion, utterly barred?

It is probable that if the legislature legislated in such manner, such would constitute both a violation of the federal Constitution's Equal Protection clause and Article II, §6 of the Oklahoma Constitution.[1] It is clear that this Court cannot constitutionally act in a manner which the legislature would be forbidden to do. *Brinkerhoff-Farris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930) (judicial branch equally bound by constitutional limitations as legislative branch). The Court offers no explanation which could even arguably support a rational basis for a more favorable treatment for defendants than plaintiffs injured in these circumstances."

"[1] Article II, §6 expressly provides, in language directly applicable here, as follows: "The Courts of justice of the State shall be open to every person, and speedy and certain remedy afforded *for every wrong and for every injury to person, property* or reputation . . . [emphases added]"

(Pet. App. 57a-58a)

In refusing to grant Petitioner's Petition for Rehearing, the Oklahoma Supreme Court never addressed the federal constitutional issue. It is clear that in so raising the issue in her Petition for Rehearing, "that federal issue has been preserved for [this Court's] review. See *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-87, n. 9, 100 S.Ct. 2035, 2043-2044, n.9 (1980.)" *Richards v. Jefferson Co. Ala.*, 517 U.S. 793, 797, n.3 (1996).

This is particularly so because the refusal of the Oklahoma Supreme Court to permit Petitioner to pursue her claims against Respondents, and its violation of Petitioner's right to equal protection, could hardly have been less anticipated by Petitioner: as the Oklahoma Supreme Court itself acknowledged in its Opinion, Petitioner's claims would have been actionable in Oklahoma by any person whose property was injured outside of a litigational context and (as the Oklahoma Supreme Court simply refused to mention), similar, or substantially lesser, misconduct would also clearly be actionable if committed in litigation by a plaintiff against a defendant. Additionally, the granting of prophylactic immunity to the Respondents and their attorneys from such misconduct is directly contrary to the legislated public policy of the State of Oklahoma. Tit. 21 Okla. Stat. 1910 §575; Tit. 76 Okla. Stat. 1910 §2. And, as indicated above, the Oklahoma constitution itself requires equal access to Oklahoma's courts for all persons injured in Oklahoma, and, accordingly, itself also apparently precluded differential treatment for plaintiffs, as opposed to defendants.

Thus, in this case it was the Oklahoma Supreme Court acting alone, in direct contravention of the dictates

of the Oklahoma legislature, and possibly of the Oklahoma constitution itself, which is solely responsible for denying Dr. Patel equal protection of the laws. Accordingly, raising such equal protection arguments in her Petition for Rehearing was sufficiently timely for this Court to consider such to preserve it, to review the misconduct of the Oklahoma Supreme Court itself. *Brinkerhoff-Farris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930) (judicial branch equally bound by constitutional limitations as legislative branch); *Richards v. Jefferson Co. Ala.*, supra (same).

REASONS FOR GRANTING THE WRIT

This Court should grant Certiorari in this case for two simple reasons. (1) The Oklahoma Supreme Court has decided a substantial federal question in a way in conflict with applicable decisions of this Court. Supreme Court Rule 17.1(c). In so deciding this case, the Oklahoma Supreme Court has deprived Petitioner of a valuable property interest – the value of her claims against Respondents OMH and St. Francis Hospital which all Respondents destroyed, together with punitive damages for such destruction – in violation of the equal protection of the laws. Such decision is in irreconcilable conflict with the following decisions of this Court: *Skinner v. Oklahoma*, 315 U.S. 535 (1942); *Levy v. Louisiana*, 391 U.S. 68 (1968); *Saenz v. Roe*, 119 S.Ct. 1518 (1999); *Romer v. Evans*, 517 U.S. 620 (1996), and *Richards v. Jefferson Co. Ala.*, 517 U.S. 793 (1996), and (2) the critical importance of this case to the administration of justice in the State of Oklahoma.

I. THE OKLAHOMA SUPREME COURT DENIED PETITIONER THE EQUAL PROTECTION OF THE LAWS IN RULING THAT RESPONDENTS WERE PROPHYLACTICALLY IMMUNE FROM LIABILITY TO HER FOR DESTROYING HER LAWSUIT AGAINST TWO OF THEM THROUGH THE USE OF EXTREME LITIGATIONAL MISCONDUCT INCLUDING FRAUD ON HER, THE TRIAL COURT, AND THE JURY WHEREAS SUBSTANTIALLY LESS SERIOUS LITIGATIONAL MISCONDUCT WOULD HAVE GIVEN RISE TO A CLAIM BY A DEFENDANT WHO WAS SUED BY A PLAINTIFF IN OKLAHOMA IN PURSUIT OF HER UTTERLY MERITLESS LEGAL POSITION.

In its Opinion in this case, the Oklahoma Supreme Court expressly recognized that Oklahoma has long recognized a cause of action for any willful misconduct to another which causes the other damage even when such misconduct does not constitute a common law court. *Mangum Electric Co. v. Border*, 101 Okla. 64, 222 P. 1002 (Okla. 1924); *Panther v. McKnight*, 125 Okla. 134, 256 P. 916 (1927); *Stebbins v. Edwards*, 101 Okla. 188, 224 P. 714 (1924); *Hibbard v. Holiday*, 58 Okla. 244, 158 P. 1158 (1916); *Schonwald v. Ragains*, 32 Okla. 223, 122 P. 203 (1912). Additionally, as discussed above, Oklahoma has long provided a cause of action at common law, codified by statute by its legislature, for damage caused by another's deceit. Tit. 76 Okla. Stat. 1910 §2. Such deceit has various elements – material, false representations made knowingly, after the injured party's reliance thereon, resulting in injury. Tit. 76 Okla. Stat. 1910 §2. Petitioner clearly alleged misconduct by Respondents which satisfied all of these requirements in her pleadings in this case. Even the

Oklahoma Supreme Court did not pretend otherwise. No Oklahoma statute has ever exempted from liability such misconduct merely because it occurred during the course of litigation.

Nevertheless, purporting to follow, but actually grotesquely extending, its earlier ruling in *Cooper v. Parker-Hughey*, 894 P.2d 1069 (Okla. 1995), the Oklahoma Supreme Court ruled such claims by Petitioner against Respondents herein utterly precluded. Such ruling is the sheerest nonsense.

In *Cooper*, the Oklahoma Supreme Court held that a convict had no cause of action in Oklahoma against an expert witness who had testified falsely against him at trial. Such convict did not purport to assert a malicious prosecution claim nor all the elements of a fraud claim against that witness, as did Petitioner herein against Respondents, although he did, of course, allege injury to his person – his false conviction. In so ruling, the Oklahoma Supreme Court purported to rely on Oklahoma statutes which, by their express terms, provide immunity solely from defamation claims against testifying witnesses. Nothing in such statutes purports to preclude any other non-defamation tort claims. Nevertheless, purporting to find in such defamation statutes a general, legislatively-enacted public policy of immunization for perjury, the Oklahoma Supreme Court in *Cooper* found such claims unactionable.

In the present case, unlike *Cooper*, the Oklahoma Supreme Court was faced with the actuality of Tit. 21 Okla. Stat. 1910 §575 which *expressly* imposes civil, treble damages liability on attorneys who commit precisely the

type of misconduct described in Petitioner's Petition. No Oklahoma statute even implies that defendants in cases such as this, or their attorneys, are entitled to any immunization for liability for the tort of malicious injury or for deceit. Thus, it is clear that the Oklahoma Supreme Court's Opinion in this case directly contravened the public policy of Oklahoma expressed in Tit. 21 Okla. Stat. 1910 §575.[6] With respect to the Respondents who were parties to the original lawsuit who acted in concert with their attorneys in committing such fraud on the Court and on Petitioner, Oklahoma law has long been equally clear that they would be equally liable as joint tortfeasors for aiding and abetting their misbehaving attorneys. *Keel v. Hainline*, 331 P.2d 397 (Okla. 1958).[7]

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[6] The only way it can be argued that Tit. 21 Okla. Stat. 1910 §575 fails to announce a public policy precluding prophylactic immunity for the Patel III Defendants would be if the Oklahoma Supreme Court's textually unsupportable reading of that statute in its Opinion herein meant that such immunity extended to all the misconduct described therein unless there is a criminal conviction. However, it is clear that no such criminal conviction has ever been required for the remaining frauds described in that statute to be actionable (which extends to any deceit to any person, or any conversion committed against a client, by an attorney), and that statute on its face, by expressly providing its treble damages remedy to be recovered in a civil proceeding, precludes any notion of any other prophylactic immunity for any of the misconduct described therein.

[7] *Keel v. Hainline* expressly permits the imposition of liability as joint tortfeasors against each party who aids and abets another. The Appendix to Restatement (Second) of Torts expressly acknowledges *Keel* as a source for §§875 and 876 which provide for such liability for all persons who act in concert in committing a single tort. Although OUJI [Oklahoma Uniform Jury Instructions] Instruction No. 16.9 permits an

Accordingly, it is clear that the immunization for Respondents the Oklahoma Supreme Court announced in this case was created by it out of whole cloth, in direct contravention of the public policy expressed by the Oklahoma legislature itself. Its claimed basis for doing so is the sophistry that the misconduct alleged in the Patel III Petition has never previously been held actionable. However, even compared to other sophistries this sophistry is nonsense: it is absolutely clear that if identical – or even substantially less culpable – misconduct were committed by a plaintiff in pursuance of her unmeritorious legal claims, rather than by defendants, as here, such misconduct would indeed be actionable in Oklahoma by the injured party as an essential part of a suit for malicious prosecution and/or abuse of process. *Voiles v. Sante Fe Minerals, Inc.*, 911 P.2d 1205 (Okla. 1996); *Young v. First State Bank*, 628 P.2d 707 (Okla. 1981). *See* OUJI[8] Instruction No. 16.6, expressly adopting the language contained in *Park v. Security Bank & Trust Co.*, 512 P.2d 113, 119 (Okla. 1973), providing that compensable malice is shown for

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affirmative defense if a party engages in misconduct in litigation "on advice of a lawyer", such reliance must be "honest" and based on full disclosure, as expressly provided therein. Where, as specifically alleged in the Patel III Petition, a party and its attorney act in concert in effecting their misconduct and both do so together knowingly, so that neither is honest in so doing, it is clear that not only is such affirmative defense unavailable, they would each be liable as joint tortfeasors for such misconduct under *Keel*.

[8] Oklahoma Uniform Jury Instructions – Civil (2nd Edition 1993) adopted by Order of the Oklahoma Supreme Court SCAD-93-3, February 26, 1993).

such purpose when an "action [that is, a litigational position has] "been done . . . willfully in a wanton or oppressive manner, and in conscious disregard of the other's rights." The blatant, fraudulent misconduct described in the Patel III Petition conducted in pursuit of Respondents' utterly meritless legal position clearly satisfied that instruction's test.

The effect of the Oklahoma Supreme Court's ruling in this case is greatly to disadvantage plaintiffs by virtue merely of their status as such vis-a-vis defendants in all litigation in Oklahoma since defendants can be compensated by plaintiffs, and receive punitive damages in addition, resulting from such plaintiffs' intentional litigational misconduct, whereas plaintiffs have no claim in Oklahoma regardless of the extent of the damage to their case – i.e., their property – and the magnitude of misconduct, caused by defendants and their attorney. This is a clear violation of equal protection of the law. *Romer v. Evans, supra* ("a law declaring that in general it should be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." 517 U.S. at 633); *Skinner v. Oklahoma*, supra (extremely disparate remedies for comparable misconduct is denial of equal protection, particularly where one injured party suffers denial of fundamental rights). This Court has long recognized that a lawsuit is a "chose in action" which constitutes "a protected property interest in its own right." *Richards v. Jefferson Co. Ala.*, 517 U.S. 793, 804 (1996). See also *Levy v. Louisiana*, 391 U.S. 68 (1968) (Denial of access to the courts to an entire class of litigants which would be actionable by other litigants must be based on rational

basis, at a minimum, to avoid equal protection violation); *Saenz v. Roe*, 119 S.Ct. 1518 (1999) (merely differential welfare benefits violates privileges and immunities and equal protection of the laws, even when expressly permitted by U.S. Congress.)

This Court has repeatedly granted certiorari to review lower court decisions that erode substantive rights by resort to unauthorized, issue-preclusive shortcuts. *Richards v. Jefferson County, Alabama*, 517 U.S. at 795-797 (1966); *Romer v. Evans*, supra; *Levy v. Louisiana*, supra. This well-considered concern on the part of this Court has extended to granting certiorari to review, and ultimately to reject, apparently well-intentioned efforts by lower courts arguably designed to streamline, and seek resolution of, extraordinarily complex, and not likely to be repeated, procedural morasses because of the potential for such shortcuts to erode substantive rights. *See Ortiz v. Fiberboard Corp.*, 119 S.Ct. 2295 (1999); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) (both involving lower court procedures designed to reach resolution of enormous asbestos class actions); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S.Ct. 956 (1998) (misapplication of venue statute in case arising out of complex multi-district litigation). Unlike these just-mentioned cases, the erosion of Petitioner's and other similarly-situated plaintiffs' substantive property rights irrationally precluded by the Oklahoma Supreme Court here is blatant, requiring no subtlety to appreciate.

The Oklahoma Supreme Court offered *no* basis, let alone any rational one, for distinguishing between plaintiffs and defendants injured in these circumstances. The only rationales it apparently purported to provide for its

decision are the claimed virtue of finality and that because Respondents' misconduct is criminal and, accordingly, *so* egregious, for that reason alone it should be immunized from civil liability. Such in itself is a completely irrational conclusion and, in any event, offers no basis for distinguishing between plaintiffs' and defendants' rights in these circumstances.

If the Oklahoma legislature had legislated in such manner, such would constitute both a violation of the federal Constitution's Equal Protection clause and Article II, §6 of the Oklahoma Constitution.[9] It is clear that the Oklahoma Supreme Court cannot constitutionally act in a manner which the legislature would be forbidden to do (and which the Oklahoma legislature has apparently forbidden the Oklahoma Supreme Court to do). *Brinkerhoff-Farris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930) (judicial branch equally bound by constitutional limitations as legislative branch). The Oklahoma Supreme Court offered no explanation which could even arguably support a rational basis for a more favorable treatment for defendants than plaintiffs injured in these circumstances.

This Court should grant certiorari and rule that the Oklahoma Supreme Court's decision granting more favorable rights to defendants than to plaintiffs in litigational circumstances is Constitutionally forbidden.

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[9] Oklahoma Constitution Article II, §6 expressly provides, in language directly applicable here, as follows: "The Courts of justice of the State shall be open to every person, and speedy and certain remedy afforded *for every wrong and for every injury to person, property* or reputation . . . [emphases added]"

II. THIS CASE IS OF CRITICAL IMPORTANCE TO THE ADMINISTRATION OF JUSTICE IN THE STATE OF OKLAHOMA.

As described above, on even date herewith, Petitioner is also filing a Petition for Writ of Certiorari in Patel II, which was also ruled on by the Oklahoma Supreme Court in the same opinion review of which is sought herein. The effect of that Court's decision in both of these cases could hardly be more corrosive to the administration of justice in Oklahoma.

The Oklahoma policy permitting lawsuits by defendants who are injured by litigational misconduct of plaintiffs and their attorneys supports the valuable public policy of protecting the integrity of the judicial system by preventing litigational misconduct by such plaintiffs through private enforcement of such. Such policy is equally served by similarly permitting plaintiffs to sue defendants who engage in such litigational misconduct in pursuit of unmeritorious defenses. There is no reason to shift the entire onus of policing defendants' attorney-complicit fraud to the bar association, and to criminal prosecutors, as the Oklahoma Supreme Court apparently demands in its Opinion in this case and in Patel II. Moreover, by immunizing such misconduct committed by defendants, the Oklahoma Supreme Court permits defrauding parties and their attorneys to retain the fruits of litigational fraud, thereby not only promoting a "catch-me-if-you-can" mentality in the Courts of Oklahoma, but also guaranteeing that even when caught, defrauding defendants and their attorneys will suffer little or no adverse consequences in most circumstances. Additionally, in its Opinion in this case and in Patel II, the

Oklahoma Supreme Court artificially discriminates between fraud discovered prior to, as opposed to subsequent to, a judgment becoming final, effectively precluding trial judges or parties from imposing or obtaining any sanctions or other remedies for after-judgment-discovered fraud. This has the further, perverse effect of encouraging defrauding defendants' attorneys to withhold knowledge of frauds on the Court because their clients will benefit if they are successful in concealing such fraud until after the judgment becomes final.

Accordingly, no public policy considerations can justify the Oklahoma Supreme Court's decision in this case. If even the extreme frauds on the Court described in Petitioner's pleadings in this case are unactionable, then it is clear that no fraud by a defendant in any Oklahoma court would be actionable in Oklahoma no matter how egregious and no matter what damages were caused thereby.

Accordingly, the effect of the Oklahoma Supreme Court's ruling is that even a pleading which clearly states true and highly provable – indeed, already proven in Patel II – facts constituting the most egregious frauds on a court and plaintiff imaginable, resulting in clear, financial damage to the property of the plaintiff have nevertheless been held not actionable in Oklahoma even though, as the Oklahoma Supreme Court explicitly recognizes, other, less culpable intentionally-injurious misconduct which results in damages to a party's property clearly is actionable. No other court has ruled the misconduct described in this case to be simply unactionable. No valid public policy can be served by providing the immunity provided by the Oklahoma Supreme Court in its Opinion.

III. CONCLUSION

It is respectfully submitted that the Writ of Certiorari be granted in light of the patent, irreconcilable conflict between the Oklahoma Supreme Court's decision and the equal protection clause of the federal constitution, as interpreted by numerous decisions of this Court.

The Oklahoma Supreme Court, in contravention of the express public policy of Oklahoma announced by the Oklahoma legislature, has sought herein grotesquely to tilt the advantage in litigation to defendants, as against plaintiffs, merely by virtue of their status as such, without any rational basis for doing so, and to deprive plaintiffs of any legal redress for the deprivation of their property caused by such defendants' and their attorneys' misconduct.

Respectfully submitted,

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December, 1999

APPENDIX A

1999 OK 33
IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

URVASHI B. PATEL, Appellee, v. OMH MEDICAL CENTER, INC., an Oklahoma Corporation, Saint Francis Hospital, Inc., an Oklahoma corporation, and John B. Stevens, an individual, Appellants. URVASHI B. PATEL, Appellant, v. OMH MEDICAL CENTER, INC., an Oklahoma Corporation, SAINT FRANCIS HOSPITAL, INC., an Oklahoma corporation, LARRY D. HENRY, an individual, and ARRINGTON, KIHLE, GABERINO & DUNN, INC., Appellees.	FOR OFFICIAL PUBLICATION Causes Nos. 90,489, and 89,582

ON APPEAL FROM THE DISTRICT COURT, TULSA COUNTY, JANE P. WISEMAN, TRIAL JUDGE, CAUSE NO. 90,489; ON APPEAL FROM THE DISTRICT COURT, TULSA COUNTY, DAVID L. PETERSON, TRIAL JUDGE, CAUSE NO. 89,582

(Filed Apr. 27, 1999)

¶0 Two related appeals stand before us for review. Both arise out of an earlier case tried to a jury in the

District Court, Tulsa County, Jane P. Wiseman, trial judge. In that action ("Patel I"), Urvashi B. Patel sought damages against OMH Medical Center, Inc., St. Francis Hospital, Inc., and John B. Stevens, an individual, for breach of contract and various torts. The jury returned a verdict for the plaintiff on the contract claim against defendant OMH Medical Center, Inc. only and for all defendants on the tort claims. The judgment, entered on the jury's verdict, was affirmed on appeal and the mandate issued. Shortly thereafter, Urvashi B. Patel filed an action ("Patel II") in the same court in which the Patel I judgment was rendered, seeking vacation of that portion of the Patel I judgment that rejected her tort claims on the ground that it had been secured by defendants' fraud. The trial court agreed and ordered the Patel I judgment vacated. In today's first appeal, the defendants in Patel I and Patel II seek reversal of the vacation order. While the vacation proceeding was pending, Patel filed an action ("Patel III") in the District Court, Tulsa County, David L. Peterson, trial judge, against the two corporate defendants in Patel I and II, their lead attorney in those cases and his law firm, for damages from various acts of fraud and deceit that allegedly occurred during the Patel I trial. Today's second appeal, brought by Patel, is from an order dismissing that action for failure to state a claim. Both causes stand retained for this court's consideration and for their disposition by a single opinion.

THE TRIAL COURT'S POSTJUDGMENT ORDER IN CAUSE NO. 90,489 VACATING THE PATEL I JUDGMENT IS REVERSED AND THE CAUSE REMANDED FOR FURTHER PROCEEDINGS TO BE CONSISTENT WITH TODAY'S PRONOUNCEMENT; THE TRIAL COURT'S ORDER OF DISMISSAL IN CAUSE NO. 89,582 IS AFFIRMED.

Clifford N. Ribner, Tulsa, Oklahoma, for Urvashi B. Patel, Appellee in Cause No. 90,489 and Appellant in Cause No. 89,582.

Larry D. Henry, Vivian C. Hale, Patrick W. Cipolla, Gable Gotwals Mock Schwabe Kihle Gaberino, Tulsa, Oklahoma, for Appellants, OMH Medical Center, Inc., St. Francis Hospital, Inc., and John B. Stevens, in Cause No. 90,489 and for Appellees, OMH Medical Center, Inc. and St. Francis Hospital, Inc., in Cause No. 89,582.

James M. Sturdivant, Vivian C. Hale, and Patrick Cipolla, Gable Gotwals Mock Schwabe Kihle Gaberino, Tulsa, Oklahoma, for Appellees, Larry D. Henry and Arrington, Kihle, Gaberino & Dunn, in Cause No. 89,582.

OPALA, J.

¶1 The dispositive issues tendered in these appeals are (1) whether the trial judge abused her discretion in ordering the Patel I judgment vacated, and (2) whether the litigation-related misconduct alleged here may be redressed through a civil action in tort. We answer the first question in the affirmative and the second in the negative.

I

THE ANATOMY OF LITIGATION

¶2 Dr. Urvashi B. Patel ("Patel" or "plaintiff"), an anesthesiologist, entered into a contract in June 1992 with OMH Medical Center, Inc. ("OMH") to practice anesthesiology and serve as director of anesthesia at OMH's medical facility in Okmulgee, Oklahoma. The contract provided that, after Patel relocated to the Okmulgee area, either party could terminate the contract for any reason or for no reason at all by giving the other party one hundred and twenty days advance written notice and by paying to the other party a termination fee of $50,000. Patel moved to the Okmulgee area and worked at OMH for a little more than one year.

¶3 In October 1993, OMH invoked the termination provision of the contract with Patel, but tendered only a portion of the contractual termination fee, claiming an off-set for its payment of Patel's malpractice insurance. Conversations took place between Patel and one or more agents of OMH concerning the amount of money owed to her under the contract and the quality of the professional recommendations OMH would provide to Patel as she sought new employment. In Patel I, these conversations were characterized by OMH as contract renegotiations, but portrayed by Patel as attempts to coerce her to abandon her contractual termination fee.

¶4 Whatever their purpose, the conversations came to nought, and Patel sued OMH, Saint Francis Hospital,

Inc., and John B. Stevens (collectively, "defendants")[1] for breach-of-contract damages, intentional infliction of emotional distress, and "prima facie tort" in connection with the termination of her contract.[2] The trial resulted in a jury verdict against defendant OMH alone on Patel's contract claim and for all defendants on the tort claims. Both Patel and OMH appealed. The Court of Civil Appeals, Division III, in an unpublished opinion filed 14

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[1] OMH – Okmulgee Medical Center – is the facility at which Dr. Patel worked. St. Francis Hospital, Inc. assisted OMH with administration and provided managerial personnel. John B. Stevens was the administrator at OMH at the time the cause of action in Patel I arose. He answered both to the OMH board of directors and to the management of St. Francis.

[2] Patel alleged in her contract claim that OMH had not properly triggered the termination provision of the contract and, therefore, continued to owe her a monthly salary of $17,500. Defendants argued that the contract had been properly terminated, that they had paid Patel all but $12,464.18 of the termination fee, and that their dispute was properly limited to the latter amount. The trial court agreed with defendants and by summary adjudication, limited Patel's contract claim to $12,464.18. Patel's tort claims – intentional infliction of emotional distress and "prima facie tort" – were based upon her allegation that the defendants attempted to coerce her into abandoning the termination fee to which she was contractually entitled by threatening to provide her with poor or neutral recommendations if she persisted in trying to obtain the fee. Patel alleged that even neutral recommendations would be ruinous to her medical career. The expression "prima facie tort" does not appear ever to have been recognized in Oklahoma. For the view that the concept of prima facie tort has been applied in Oklahoma jurisprudence under limited circumstances, *see* Merrick v. Northern Natural Gas Co., 911 F.2d 426 (10th Cir. 1990).

May 1996, affirmed.[3] Patel's petition for certiorari was denied.

¶5 Shortly after accepting payment in satisfaction of the judgment and after the mandate in Patel I issued, plaintiff filed the first proceeding under review today ("Patel II"), seeking to vacate, pursuant to the provisions of 12 O.S. 1991 § 1031(4), that portion of the Patel I judgment which rejected defendants' liability on her tort claims. Patel alleges that the judgment was obtained through fraud committed on Patel and on the trial court in connection with the judge's decision in the Patel I trial to admit into evidence a certain defense exhibit ("Exhibit 1").

¶6 Exhibit 1 was a negative evaluation of Patel's professional performance provided to OMH by Scotland Memorial Hospital ("SMH"), the medical facility at which Patel worked prior to joining the staff of OMH. It was prepared by Mark W. Matson, M.D., Chair, Department of Surgery, a colleague of Patel at SMH[4] At the Patel I trial, OMH sought to introduce Exhibit 1, not for the truth of its contents, but for the purpose of rebutting an expert witness who testified on Patel's behalf that Patel would have suffered severe harm to her medical career had

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[3] Urvashi B. Patel v. OMH Medical Center, Inc., St. Francis Hospital, Inc., and John B. Stevens, an individual, Supreme Court Cause No. 85,661, an unpublished opinion of the Court of Civil Appeals, Division III, May 14, 1996.

[4] Dr. Matson rated Patel's skills as average or below average, stating that her privileges had at one time been revoked, and recommending that she be monitored before being granted full privileges.

OMH carried out its alleged threats to deny her good references. In the expert's opinion, a doctor who had a negative reference in her file could not be hired. Exhibit 1 was offered to show that OMH had hired Patel despite the negative reference in her file from Dr. Matson, thereby rebutting Patel's expert witness.[5]

¶7 Patel objected to the admission into evidence of Exhibit 1. At a bench conference held to discuss the objection,[6] Patel's attorney stated that an OMH source had told his client that her OMH credentialing file contained a document from, or prepared from statements made by, another doctor who had worked with Patel at SMH. According to Patel, this document explicitly refuted the negative evaluation provided by Dr. Matson, characterizing Dr. Matson's attitude toward Patel as one of personal animosity.[7] Neither Patel nor her attorney had actually seen this document. Patel's attorney further informed the judge that he had only been told a few days before trial that Dr. Matson's negative evaluation would

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[5] Dr. Matson's response was dated July 2, 1992. The contract between OMH and Patel was executed on June 16, 1992, two to three weeks *before* OMH received Exhibit 1 from Scotland Memorial Hospital. Patel makes the point that it could not therefore have played any part in OMH's original decision whether to hire her. It was received before her application for hospital privileges was considered by a peer review committee and was included in the materials the committee reviewed.

[6] The bench conference is transcribed in the trial record at pages 610-617.

[7] The refuting document turned out to be a memo drafted by an OMH employee, who prepared it to memorialize her telephone conversation with the doctor from Scotland Memorial Hospital who provided the refuting information.

be offered into evidence and that he had responded to that information by insisting that the entire file in which it was kept be produced.

¶8 The transcript of the bench conference shows that the court was clearly reluctant to admit Exhibit 1 into evidence. The OMH witness offering it had not been responsible for the file at the time it was created, and defendants had not brought to the trial the original file in its entirety. The court asked defendants' attorney several times in various ways whether there was anything in the file of the nature described by Patel's attorney. The answer was repeatedly that there was not and that Exhibit 1 was a complete document in itself. At one point, the court tried to pin down an answer by stating,

> " . . . The point is not that this document is incomplete but that there may be something in the file that references this document that explains it or further modifies it in some respect. . . . He is entitled to have that produced . . . "

Defendants' attorney responded,

> "There is nothing in the file of that nature. There are contradictory references from that city."

¶9 The judge then stated that she thought she needed to look at the file, but after being informed that the file was in Okmulgee, she decided to admit Exhibit 1 into evidence and permit Patel to offer testimony in rebuttal. Patel's attorney responded to the court's decision by saying,

> "Okay. That is fine."

¶10 Exhibit 1 was admitted into evidence. Patel's rebuttal testimony contraposed her unsubstantiated belief about the contents of her credentialing file to defendants' documentary evidence. Patel argues that the admission of Exhibit 1 without the refuting document left the jury with the false impression that a negative reference would not be an impediment to a doctor's future employment. Exhibit 1, she asserts, would have had little or no probative value at all on that issue if the existence of the refuting document had been known.

¶11 In her petition to vacate, Patel alleged that defendants' representations to the court regarding the contents of Patel's OMH file were false, that they were relied upon by the court in admitting Exhibit 1, and that the admission of Exhibit 1 tainted the verdict both because its negative contents prejudiced the jury against Patel and because it falsely rebutted a central contention in Patel's case, i.e. that a negative reference would severely harm her medical career.

¶12 In response to the petition to vacate, defendants filed a motion to dismiss, which was denied. Patel filed a motion for summary judgment. Oral arguments on the motion for summary judgment were heard on 27 March 1997. At the conclusion of the hearing, the trial court stated that she was not prepared to rule on the motion at that time, but would review the parties' submissions and make a decision at a later date.

¶13 On 14 November 1997 the trial court issued a ruling entitled "Order on Plaintiff's Petition to Vacate in Part." Neither in the title nor in the body of the instrument did the court specifically state whether the order

was responsive to Patel's motion for summary judgment, but it did state that the court had "reviewed and considered the parties' submissions on Plaintiff's Petition to Vacate Judgment in Part, including their briefs, affidavits, exhibits, oral arguments, and case authority." The court quoted extensively from the record of the bench conference and then concluded,

> "Mr. Henry made a specific representation to the Court that there was nothing in the file of the nature about which the Court was clearly concerned. This representation was, in fact, false, there being in the file a typed memorandum by Karen Legg, OMH's risk manager, who kept the credentialing files, regarding a call from Dr. Parkes at Scotland Memorial, a memorandum on this very point and falling squarely within the category sought by the Court. Dr. Parkes called specifically to refute Dr. Matson's negative reference and to explain the circumstances under which Dr. Matson criticized the Plaintiff's professional conduct, a negative evaluation which Dr. Parkes stated was 'strictly of a personal nature' and constituted a 'lack of professionalism on Dr. Matson's part.' . . . Mr. Henry [defendants' attorney] made the representation knowing that the Court was relying on it as a true representation of the state of the file which was known to Mr Henry but not to Mr. Ribner [Patel's attorney] or the Court.
>
> If Mr. Henry had responded that there was something in the file of that nature, the Court would have required it to be produced or would have excluded Defendant's Exhibit 1 on the basis that its admission, absent the additional file material, would mislead the jury on the

> exact point on which Mr. Henry offered it, that the presence of a negative reference in the file was no impediment to a doctor's future employment.
>
> Mr. Henry's misrepresentation to the Court and opposing counsel constitutes grounds under 12 O.S. Section 1031(4) to vacate the judgment on Plaintiff's tort claims entered on the jury verdict."

¶14 The petition to vacate having been granted, defendants filed their petition in error, which is *the first appeal under review today.* This court ordered the appeal retained.

¶15 In February 1997 while the petition to vacate was pending, Patel filed a third action ("Patel III")[8] against the corporate defendants in Patel I and Patel II, defendants' lead attorney in those cases, Mr. Larry D. Henry, and his law firm, Arrington, Kihle, Gaberino & Dunn, Inc. In Patel III, Patel seeks compensatory and punitive damages in tort for acts of fraud, deceit, and spoliation of evidence allegedly occurring during the Patel I trial.

¶16 Defendants moved to dismiss the Patel III petition on the grounds that it failed to state a claim upon which relief can be granted. The trial court agreed, ruling that no basis exists under current Oklahoma case authority for Patel's claims. Patel's appeal from the dismissal order is *the second case which we review today.* It, too, was retained for this court's disposition.

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[8] Patel III was assigned to Judge David L. Peterson, rather than to Judge Jane P. Wiseman, who presided over Patel I and Patel II.

II

STANDARD OF REVIEW

A.

A CORRECT CHARACTERIZATION OF THE TRIAL COURT PROCEEDINGS MUST PRECEDE THE COURT'S SELECTION OF THE STANDARD OF REVIEW.

¶17 This case presents a procedural imbroglio that makes the assignment of the appropriate standard of review somewhat difficult. Two motions were presented to the trial court. One was defendants' motion to dismiss. The other was Patel's motion for summary judgment. A motion to dismiss may be interposed against a petition to vacate.[9] The purpose of a dismissal motion is to test the law's support for a claim, not the sufficiency of the underlying facts.[10] Where a motion to dismiss tenders facts to be considered by offering materials *dehors* the pleadings, it is incumbent upon the trial court to treat the motion as one for summary judgment.[11] Defendants'

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[9] Lewis v. Couch, 194 Okla. 632, 154 P.2d 51, 52 (1944); Stout v. Derr, 171 Okla. 132, 42 P.2d 136, 138 (1935). These cases, decided before the adoption of the Oklahoma Pleading Code, 12 O.S. 1991 §§ 2001 et seq., approved the interposition of a demurrer to a petition to vacate. A demurrer to a petition under 12 O.S. 1981 § 267 contained many of the same grounds for challenging the sufficiency of pleadings as are now provided for by the motion to dismiss in 12 O.S. 1991 § 2012(B). By analogy, a motion to dismiss may now be interposed against a petition to vacate to the same extent as a demurrer might have been under the earlier regime.

[10] Zaharias v. Gammill, 1992 OK 149, ¶6, 844 P.2d 137, 138.

[11] Dyke v. Saint Francis Hospital, Inc., 1993 OK 114, ¶7, 861 P.2d 295, 298-299; Norman v. Trison, 1992 OK 67, ¶4, 832 P.2d 6, 8. *See also* Silver v. Slusher, 1988 OK 53, n. 8, 770 P.2d 878, 881, n.

motion to dismiss tendered for consideration in this case an excerpted portion of the transcript of testimony in the Patel I trial. This material's inclusion required the trial court to treat defendants' dismissal motion as a motion for summary judgment. *In short, the end result of this procedural exchange confronted the trial court with cross motions for summary judgment.*

¶18 Summary process is governed by District Court Rule 13.[12] It sets forth in detail the procedures to be followed where there are no fact issues in dispute and *judgment may be appropriate as a matter of law. By its very terms, Rule 13 applies to prejudgment issues only.*[13] *A vacation proceeding under 12 O.S. 1991 § 1031 is a legislatively created remedial mechanism in which a litigant seeks not a judgment, but rather relief from a judgment.*[14] *There are no*

8, *U.S. cert. denied sub nom.* Silver v. Farmers & Merchants Ins. Co., 493 U.S. 817, 110 S.Ct. 70, 107 L.Ed.2d 37 (1989). The pertinent portion of 12 O.S. 1991 § 2012(B) states:

> " . . . If, on a motion asserting the defense numbered 6 of this subsection to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by the rules for summary judgment. . . . "

[12] 12 O.S. 1991 Ch. 2, App., Rule 13.

[13] *Cf.* Pickens v. Tulsa Metropolitan Ministry, 1997 OK 152, ¶7, 951 P.2d 1079, 1082.

[14] Parker v. Board of County Commissioners of Okmulgee County, 187 Okla. 308, 102 P.2d 880 (1940). *See also,* Assmann v. Fleming, 159 F.2d 332, 336 (8th Cir. 1947). The statute setting

prejudgment issues in a vacation proceeding. On the contrary, a vacation quest is *a postjudgment remedy*. It represents neither a common law or statutory claim nor does it result in a judgment which settles the rights between the parties. Because a vacation proceeding is *a statute-governed procedure to determine postjudgment issues*, summary adjudication process cannot be utilized to decide the matters in contest.[15] This is not to say that an adversary

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forth the courts' power to vacate or modify their own judgments is found at 12 O.S. 1991 § 1031. The first two grounds relate to the courts' power under other statutes to grant a new trial and are governed by the provisions of those other statutes. The third ground for modification or vacation of a judgment or order is that of mistake, neglect or omission of the clerk or irregularity in obtaining a judgment or order. Relief on this ground may be requested in the form of a motion. 12 O.S. 1991 § 1032. Proceedings to vacate or modify a judgment or order on the fourth through ninth grounds of § 1031 must be initiated by a petition and verified by affidavit setting out certain specified information. 12 O.S. 1991 § 1033. Personal jurisdiction must be obtained by the issuance and service of a summons "as in the commencement of an action." Id. Petitions to vacate on the grounds numbered four through nine must be initiated within two years of the date of the judgment or order sought to be vacated or, in the case of fraud, within two years of the discovery of the fraud. 12 O.S. 1991 § 1038.

[15] The use of summary process in a postjudgment remedial procedure such as that under review today would not even be contemplated were it not for some earlier decisions by this court suggesting that a vacation quest is a civil action. Lewis v. Couch, 194 Okla. 632, 154 P.2d 51 (1944); Turner v. First Nat'l Bank & Trust Co. of Oklahoma City, 186 Okla. 403, 97 P.2d 894 (1940); Stout v. Derr, 171 Okla. 132, 42 P.2d 136 (1935); Burton v. Swanson, 142 Okla. 134, 285 P. 839 (1930); Dardenne v. Daniels, 101 Okla. 201, 225 P. 152 (1924). These cases are generally concerned with the procedural tools initially available to a

hearing must be afforded in every vacation quest. Although the Rule 13 procedural regime *is textually confined to prejudgment issues*, there is no legal impediment to the use – *in a § 1031 postjudgment vacation proceeding* – of acceptable evidentiary substitutes[16] to eliminate from adversary contest *any individually and clearly defined fact issue* that is claimed as undisputed and shown to be supported *solely by inferences* consistent with the movant's position in the case.[17]

¶19 Removing then, as we do, Rule 13 from the procedural arsenal available in a vacation proceeding, we must treat both Patel's motion for summary judgment and defendants' motion to dismiss/motion for summary

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defendant in response to the service of a petition to vacate. They relate to the form of the initial pleadings and not to the substantive nature of the proceeding as a whole. Their use of the term "civil action" in reference to a vacation proceeding does not support the sweeping conclusion that a vacation proceeding is a civil action in all respects and for all purposes. To the extent that these cases, all of them antedating the birth of summary process, express that view, they are disapproved.

[16] " 'Acceptable probative substitutes' are those which may be used as 'evidentiary materials' in the summary process of adjudication." Shamblin v. Beasley, 1998 OK 88, 967 P.2d 1200, 1208, n.22 (quoting from Jackson v. Oklahoma Memorial Hosp., 1995 OK 112, 909 P.2d 765, 773 n. 35 and Gray v. Holman, 1995 OK 118, 909 P.2d 776, 781 n. 16). *See also*, Seitsinger v. Dockum Pontiac Inc., 1995 OK 29, 894 P.2d 1077, 1080-81; Davis v. Leitner, 1989 OK 146, 782 P.2d 924, 926-27.

[17] Probative material to be used for support of one's position that a certain "individually and clearly defined issue" is to be taken as undenied could be tendered by a party's motion to eliminate the identified issue (or issues) from consideration in an adversary hearing.

judgment as mere cross motions to enter matter for hearing. The trial court's order granting Patel's petition to vacate must hence be viewed as *responding directly* to Patel's quest for vacation.[18] The appropriate standard of review is to be assigned on that basis.

B.

STANDARD FOR REVIEW OF AN ORDER GRANTING OR DENYING A PETITION TO VACATE ON THE GROUNDS OF FRAUD

¶20 The standard for review of a nisi prius order granting or denying a petition to vacate is whether the trial court abused its discretion.[19] An abused judicial

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[18] The record reflects that oral arguments on the motion for summary judgment were heard on 27 March 1997. At the conclusion of the hearing, the trial court stated that she was not prepared to rule on the motion at that time, but would review the parties' submissions and make a decision at a later date. On 14 November 1997, the trial court issued a ruling entitled "Order on Plaintiff's Petition to Vacate in Part." Neither in the title nor in the body of the instrument does the court specifically state that she is ruling on Patel's motion for summary judgment, but she does state that she has "reviewed and considered the parties' submissions on Plaintiff's Petition to Vacate Judgment in Part, including their briefs, affidavits, exhibits, oral arguments, and case authority." The Order then grants Patel's petition to vacate. It is unclear whether the court intended her order to be responsive to the motion for summary judgment or whether it was issued directly in response to the petition to vacate.

[19] Farm Credit Bank of Wichita v. Trent, 1997 OK 70, ¶21, 943 P.2d 588, 591; Hassell v. Texaco, Inc., 1962 OK 136, ¶14, 372 P.2d 233, 235; Lambert v. Lambert, 206 Okla. 577, 245 P.2d 436, 439 (1952); Parker v. Board of County Comm'rs of Okmulgee County, 187 Okla. 308, 102 P.2d 880, 882 (1940).

discretion is manifested when discretion is exercised to an end or purpose not justified by, and clearly against, reason and evidence.[20] It is discretion employed on untenable grounds or for untenable reasons, or a discretionary act which is manifestly unreasonable.[21] We turn next to consider whether the trial court abused her discretion in granting the petition to vacate in this case.

III

THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE ORDER VACATING THE PATEL I JUDGMENT

¶21 Defendants urge four grounds for reversal of the trial court's order vacating the Patel I judgment: (1) the vacation proceeding is barred by settled-law-of-the-case doctrine, (2) Patel's allegations of *intrinsic fraud* are not sufficient to vacate a judgment, (3) Patel has failed to show that defendants' misrepresentations, if any, were made with the scienter necessary for securing the vacation of a judgment, and (4) an evidentiary hearing is required prior to the vacation of a judgment for fraud and none was afforded to defendants. We hold that the nisi prius order vacating the Patel I judgment must be reversed and the cause remanded, though we do so for reasons other than those raised in defendants' first three arguments. We reverse the nisi prius order in this case

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[20] In re Stackman, 1963 OK 264, ¶29, 388 P.2d 305, 311; State ex rel. Shull, 142 Okla. 293, 286 P. 891 (1930).

[21] *See, e.g.* State ex rel. Campbell v. Cook, 86 Wash. App. 761, 938 P.2d 345 (1997).

both because we agree with defendants' fourth ground for reversal – that an evidentiary hearing was indeed the defendants' due – as well as because of the need to explore below the prudential issues newly unveiled in Part III D.

A.

A PETITION TO VACATE IS NOT BARRED BY SETTLED-LAW-OF-THE-CASE DOCTRINE

¶22 Defendants first argue that Patel's petition to vacate is barred by settled-law-of-the-case doctrine.[22] In their view, all issues relating to Exhibit 1 and the contents of Patel's credentialing file were settled in the appeal of the Patel I case, barring Patel from thereafter raising in the context of a vacation proceeding any issue relating to Exhibit 1. Settled-law-of-the-case doctrine operates to bar relitigation of issues in a case that are finally settled by an appellate opinion or those the aggrieved party failed to raise on appeal.[23] Settled-law-of-the-case doctrine is a rule of judicial economy designed to prevent an appellate court from twice having to deal with the same issue. The issue in a vacation proceeding under 12 O.S. 1991 § 1031(4) is fraud. There is nothing in the course of antecedent decisional process in this case that has settled

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[22] The correctness of the defendants' contention that the vacation quest was barred by the settled-law-of-the-case doctrine is the only argument that must undergo *de novo* review.

[23] Morrow Dev. Corp. v. American Bank & Trust Co., 1994 OK 26, n.2, 875 P.2d 411, 413, n.2; Mobbs v. City of Lehigh, 1982 OK 149, n.5, 655 P.2d 547, 549, n.5; Panama Processes v. Cities Service Co., 1990 OK 66, n.27, 796 P.2d 276, 283, n.27.

the issue of fraud. Accordingly, settled-law-of-the-case doctrine is not a bar to plaintiff's vacation quest.

B.

INTRINSIC FRAUD WILL SUPPORT THE VACATION OF A JUDGMENT WHERE RELIEF FROM THE JUDGMENT IS SOUGHT IN THE MANNER AND WITHIN THE TIME SPECIFIED BY STATUTE

¶23 Defendants next argue this court's extant jurisprudence requires that relief from a judgment under the provisions of § 1031(4) be predicated upon fraud which is "extrinsic" or which amounts to "fraud on the court." "Intrinsic fraud," they assert, will not support the vacation of a judgment where relief is sought under the provisions of § 1031. Defendants maintain that the trial court erred in granting Patel's vacation quest because her petition to vacate alleges acts of intrinsic fraud only. *We disagree.* Defendants are *incorrect* in their contention that *a § 1031 vacation quest must rest upon extrinsic fraud.* To the contrary, relief from a judgment in a statutory proceeding brought pursuant to § 1031 *may be predicated upon intrinsic as well as extrinsic fraud.* Only where vacation is sought in an independent action pressed *after* the lapse of the statutory period for bringing a § 1031 proceeding is the petitioner circumscribed by the extrinsic-fraud requirement.

¶24 The distinction between intrinsic and extrinsic fraud in proceedings to set aside a judgment for fraud is usually traced back to the case of *United States v.*

Throckmorton,[24] a nineteenth-century decision by the United States Supreme Court. In that case, an independent action in equity, the Court refused to set aside a judgment obtained more than twenty years earlier on allegedly perjured testimony and falsified evidence.[25] In *Throckmorton* the Court provided an extensive analysis of the then-extant English and American authorities on the subject of setting aside judgments for fraud and arrived at what has become the classic description of the two types of fraud.[26] When the Federal Rules of Civil Procedure were amended in 1946, the *Throckmorton* limitation was explicitly rejected in federal vacation proceedings initiated within the time limit provided by the rule for

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[24] United States v. Throckmorton, 98 U.S. 61, 25 L.Ed. 93 (1878).

[25] Id. at 69.

[26] Throckmorton, at 65-66. ("Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side, – these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new trial and a fair hearing. (citations omitted) . . . On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed. . . . ").

seeking relief by motion.[27] Its viability in vacation proceedings initiated under the federal rules by an independent action remains an area of controversy in federal civil procedure.[28]

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[27] FRCP Rule 60(b)(3) provides:

"Rule 60. Relief From Judgment or Order

(b) . . . On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), . . . "

[28] 7 J. Moore, J. Lucas, MOORE'S FEDERAL PRACTICE ¶60.24[1] at 60-206; *See, e.g.* Averbach v. Rival Manufacturing Co., 809 F.2d 1016 (3rd Cir. 1987), *cert. denied*, 482 U.S. 915, 107 S.Ct. 3187, 96 L.Ed.2d 675 (1987); *cert. denied*, Rival Manufacturing Co. v. Averbach, 484 U.S. 822, 108 S.Ct. 83, 98 L.Ed.2d 45 (1987) (" '[The distinction] is most unfortunate, if true. [It] rests on cloudy and confused authorities, its soundness as a matter of policy is very doubtful, and it is extremely difficult to apply. It ought not to persist as a limit on independent actions now that it has been abolished on motions.' 11 C. Wright & A. Miller, Federal Practice and Procedure § 2868, at 240-241 (1973) (footnotes omitted)"). Indeed, some have questioned whether *Throckmorton* actually remained authoritative even as it was being cited by state and federal courts for a century. The ambiguity lies in the dictum of Mr. Justice Harlan in the case of Marshall v. Holmes, 141 U.S. 589 (1891), decided thirteen years after *Throckmorton*. Like *Throckmorton*, *Marshall* involved forged documents and perjured testimony introduced at trial. In *Marshall*, Mr. Justice Harlan stated that equity will provide relief from any judgment obtained through fraud where conscience requires relief and the complaining party is not at fault. Id. at 596. This appears to directly contradict the holding in *Throckmorton*, yet *Throckmorton* was cited as the authority for the dictum. The Court has never resolved the apparent conflict.

¶25 This court has adopted the essence of the *Throckmorton* definitions of extrinsic and intrinsic fraud. We have defined *extrinsic fraud* as "(a) any fraudulent conduct of a successful party, (b) perpetrated *outside* of an actual adversary trial or process and (c) practiced directly and affirmatively on the defeated party, (d) whereby he was prevented from presenting *fully* and *fairly* his side of the case."[29] Examples of extrinsic fraud include false representations that the defeated party is merely a nominal party against whom no relief is sought, false promises of compromise, concealment of suit, kidnapping of witnesses, and similar conduct. [30] We have defined "*intrinsic fraud*" as:

> " . . . any fraudulent conduct of the successful party which was practiced during the course of an actual adversary trial of the issues joined and which had no effect directly and affirmatively to mislead the defeated party to his injury after he announced that he was ready to proceed with the trial. If during the trial the successful party urges forged instruments, or perjured testimony or fails to introduce witnesses of whom he has knowledge and whose testimony would help his adversary and impair his own case, he is guilty of fraud; but it is intrinsic fraud, for relief from which application must be made to the court

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[29] FDIC v. Jernigan, 1995 OK 54, ¶15, 901 P.2d 793, 798; Chapman v. Chapman, 1984 OK 89, ¶9, 692 P.2d 1369, 1372-1373; Sadberry v. Hope, 1968 OK 107, ¶13, 444 P.2d 175, 177.

[30] Sadberry, *supra* note 29 at ¶13, at 177.

having jurisdiction of the issues joined and tried."[31]

¶26 While the definitions are fairly simple and straightforward, their application has often been somewhat hazy, leaving the erroneous impression that vacation proceedings brought under § 1031 are restricted to extrinsic fraud. Defendants cite a number of cases in support of their contention that intrinsic fraud will not support relief from a judgment under the provisions of § 1031(4). In *Chapman v. Chapman*,[32] a former wife sought, nearly fifteen years after a divorce had been granted, the vacation of the property settlement provisions of a divorce decree on the ground of fraud. The trial court sustained a demurrer to her petition and this court affirmed, holding that the husband's alleged concealment of spousal assets did not rise above intrinsic fraud. *Defendants mistakenly interpret this case as an application of the extrinsic fraud rule to a § 1031 proceeding. It was not.* While we did in fact apply the extrinsic fraud rule, we did so only because the petitioner had failed to file her petition within the time limit provided for a §1031 proceeding. *Chapman* was an independent suit in equity, not a §1031 proceeding, the time for which had expired two years after the divorce decree had been rendered. We noted in *Chapman, "An independent suit in equity . . . will not lie for relief from intrinsic fraud but only from extrinsic fraud. Relief*

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[31] Miller v. Miller, 1998 OK 24, n.74, 956 P.2d 887, 905, n.74, and Chapman, *supra* note 29 at 1373, n.6, both quoting from Calkin v. Wolcott, 182 Okla. 278, 77 P.2d 96, 100 (1937); FDIC v. Jernigan, *supra* note 29 at ¶14, at 798.

[32] Chapman, *supra* note 29.

from the former must be by direct attack in the same case in which fraud was committed . . . " (emphasis added).[33]

¶27 Defendants also cite *In re Forfeiture of a 1974 Mercury Cougar,*[34] in which the court recited the extrinsic fraud rule in a case brought under the provisions of §1031, but then decided the case on a different basis. The Ponca City police had seized a 1974 Mercury Cougar owned by petitioners, charging that the car was being used unlawfully to transport marijuana. The car was subject to a purchase money security interest held by Bank. No notice of forfeiture was given to Bank as required by statute and Bank was not represented at the forfeiture hearing. A forfeiture order was issued, following which Bank released its lien. Petitioners sought to vacate the forfeiture order under the provisions of §1031 (4) on the grounds of constructive fraud for failure of the State to provide the requisite statutory notice to Bank. The trial court sustained the State's demurrer. On appeal, this court recited the extrinsic fraud rule, but it is readily apparent that it was not the basis of the court's decision. The opinion states that the existence of the lien was simply irrelevant; it would not have been a defense to the forfeiture action. *The opinion clearly rests on the court's view that no fraud was involved.*[35] Any reference in that case to the extrinsic fraud rule was purely gratuitous.

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[33] Id. at 1373, n.6.

[34] 1978 OK 102, 581 P.2d 465.

[35] Id. at ¶12, at 467.

¶28 Other cases cited by defendants are also distinguishable. *Byrd v. Marlin*,[36] an action to set aside a judgment and cancel certain conveyances, was not brought in the same case and same court in which the judgment sought to be vacated was rendered. It was an independent proceeding brought on grounds authorized by §1031(4), but not technically a §1031 proceeding. The court discussed the extrinsic fraud rule, but appears to have decided the case on the basis of unconscionable conduct on the part of a trustee toward the cestui que trust.

¶29 In *Pippin v. Jones*,[37] a divorce decree had determined Mr. Pippin to be the father of a child of the marriage. Sometime later, Mr Pippin brought a §1031 proceeding, claiming fraud in the finding of paternity in the divorce action. This proceeding resulted in an agreed order that he was not the child's father. Still later, the ex-wife brought a paternity action against another man. The trial court in that paternity action found that the agreed order establishing Mr. Pippin's non-paternity was void for failure to comply with §1031. On appeal, the appellate court, after reciting the extrinsic fraud rule, affirmed the trial court's order, holding that Mr. Pippin had never alleged in his §1031 proceeding that any fraud had been practiced on him regarding his paternity and had therefore never properly invoked §1031.[38] Hence, the *Pippin* decision had nothing to do with the distinction between intrinsic and extrinsic fraud.

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[36] 208 Okla. 655, 258 P.2d 649 (1953).

[37] 1993 OK CIV APP 113, 856 P.2d 609.

[38] Id. at ¶16, at 611.

¶30 Two other appellate decisions cited by defendants appear at first blush to support their contention that only extrinsic fraud will support the vacation of a judgment, but each of these contains a qualification that in essence consumes the rule it purports to invoke. In *Copeland v. Anderson*,[39] an ex-wife brought a proceeding to modify a property settlement in a divorce action on the ground of fraud. Holding that the ex-husband's motion to dismiss was correctly granted, the Court of Civil Appeals stated that a §1031 proceeding

> "is restricted to a narrow range of malfeasance extrinsic and collateral to the issues tried. . . . Allegations that a judgment was obtained on evidence known by plaintiff to be false are not sufficient to permit disturbance of the judgment when such party was not prevented from fully and fairly presenting his side of the case."[40]

The appellate court then discussed at some length the fact that the petitioner in *Copeland* had reason to be suspicious of her husband's actions even before the divorce action was filed and that she apparently could have, and should have, "garnered the evidence in advance of trial and presented it in court."[41] The court's focus on the petitioner's suspicions prior to the original trial, when viewed in light of the court's statement quoted above that false evidence will not support disturbance of a judgment *when such party was not prevented from fully and fairly*

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[39] 1985 OK CIV APP 30, 707 P.2d 560, *overruled on other grounds*, Cooper v. Parker-Hughey, 1995 OK 35, 894 P.2d 1096.

[40] Id. at ¶39, at 570.

[41] Id. at ¶42, at 570.

presenting his side of the case, suggests that the real question for the court was not whether the fraud was extrinsic or intrinsic, but whether the judgment had been secured under circumstances requiring relief.

¶31 A similar case is *Sadberry v. Hope.*[42] Again the court appears to be relying on the rigid extrinsic-intrinsic rule, but as in *Copeland* posits the means of escape from the constraint on its discretion that the inflexible application of that rule imposes. In *Sadberry,* the plaintiff sought a writ of prohibition to restrain the trial judge from conducting a hearing on a guardian's petition to vacate a judgment imposing a surcharge on her. In holding that the writ of prohibition should be granted, the court recited the general rule that fraud sufficient to support the vacation of a judgment must be extrinsic and collateral to the issues tried and must prevent the complaining party from fairly exhibiting his case in court.[43] The court went on to explain that the matters about which the guardian claimed fraud were all known to her at the time of trial and were presented at the trial or could have been presented had the guardian chosen to present them. Further, the court noted that the guardian had failed to show how the plaintiffs or their counsel had prevented her from presenting fully and fairly her side of the case. Both *Copeland* and *Sadberry,* which appear to reject intrinsic fraud as a ground for vacating a judgment, *actually turn less on that distinction and more on the question of whether*

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[42] 1968 OK 107, 444 P.2d 175.

[43] Id. at ¶12, at 177.

the complaining party had a fair adversary proceeding, regardless of the category into which the allegations of fraud happened to fall.

¶32 The provisions of §1031(4) make no distinction between intrinsic and extrinsic fraud. To the extent that *Copeland, Sadberry,* or any other decisions of this court have applied the intrinsic/extrinsic dichotomy to vacation proceedings under §1031(4) brought in the same court in which the judgment sought to be vacated was rendered, their expressions are disapproved and withdrawn. *More recent decisions have made clear* that the intrinsic/extrinsic polarity is not applicable to vacation proceedings brought pursuant to §1031.[44] *Patel's petition is not insufficient* because the acts alleged to be fraudulent may be categorized as intrinsic fraud.[45]

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[44] FDIC v. Jernigan, 1995 OK 54, 901 P.2d 793 (holding that because the allegation of fraud was of an intrinsic nature, the vacation quest was time-barred in that it had been brought after the lapse of two years from the date of the order sought to be vacated); Chapman v. Chapman, 1984 OK 89, 692 P.2d 1369 (holding that a vacation claim instituted more than two years after judgment – by an independent suit in equity rather than in the original case – must be predicated upon extrinsic fraud practiced in obtaining the judgment).

[45] Patel argues that defendants' fraud also constitutes "fraud on the court." We need not decide whether the fraud alleged is or is not fraud on the court because we have held that her petition is sufficient based upon intrinsic fraud. It is likewise unnecessary to determine whether an attorney's misrepresentations to the court in a bench conference, which are not in themselves testimony in the case in chief, are intrinsic or extrinsic to the proceeding. We merely hold that *if* the allegations in Patel's petition state intrinsic fraud, they are sufficient to support the relief requested.

C.

PROOF OF ACTUAL FRAUD IS NOT NECESSARY TO OBTAIN §1031 RELIEF FROM A JUDGMENT

¶33 Defendants next contend that in order for a vacation quest to succeed, all of the elements of actual fraud must be established, including an intent to deceive. They argue that Patel has failed to prove that defendants' misrepresentations, if any, were made with the requisite scienter. Moreover, the order granting Patel's petition to vacate failed to make any finding that defendants intended to deceive either the trial court or Patel. We reject the contention that proof of actual fraud is required in order to obtain relief from a judgment under §1031.

¶34 Fraud, a generic term with multiple meanings[46] is divided into actual fraud and constructive fraud.[47] Actual fraud is the intentional misrepresentation or concealment of a material fact which substantially affects another person.[48] Constructive fraud, a breach of either a legal or equitable duty, does not necessarily involve any moral guilt, intent to deceive, or actual dishonesty of purpose.[49] It may be defined as any breach of a duty

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[46] Faulkenberry v. Kansas City Southern Railway Co., 1979 OK 142 ¶4, 602 P.2d 203, 206, *U.S. cert. denied*, 464 U.S. 850, 104 S.Ct. 159, 78 L.Ed.2d 146 (1983); Singleton v. LePak, 1967 OK 37, ¶13, 425 P.2d 974, 978.

[47] Faulkenberry, *supra* note 46 at n. 6, at 206, n. 6; Steele v. Steele, 295 F.Supp. 1266, 1269 (D.C.W.Va. 1969).

[48] Faulkenberry, *supra* note 46 at ¶4, at 206.

[49] Id. at ¶4, at 206. Constructive fraud does not require an intent to deceive, and liability for constructive fraud may be based on negligent or even innocent misrepresentation. U.S. Fibres, Inc. v. Proctor & Schwartz, Inc., 358 F.Supp. 449, *aff'd*, 509

which, regardless of the actor's intent, gains an advantage for the actor by misleading another to his prejudice.[50] Constructive fraud, which has the very same legal consequence as actual fraud, may be invoked to prevent harm or to extend protection to recognized public interests.[51]

¶35 In some older decisions of this court, it was held that only actual fraud would support the vacation of a judgment.[52] *In light of our view, just stated, that constructive fraud has the very same legal consequences as actual fraud, such a restriction can no longer be considered a correct exposition of our statutory law.* Hence, constructive fraud will support the vacation of a judgment in a §1031 proceeding, and the trial court's order here under review is not infirm by its failure to make a finding of fact as to the element of intent required for proof of actual fraud.

F.2d 1043, 1047 (6th Cir. 1975). Phillips v. Ball, 1960 OK 145, ¶13, 358 P.2d 193, 197 (where one has a duty to speak, but remains silent, he may be guilty of constructive fraud).

[50] *See* France v. Chaprell Jeep-Eagle Dodge, Inc., 1998 OK CIV APP 159, ___ P.2d ___.

[51] Faulkenberry, *supra* note 46 at ¶4, at 206.

[52] Fed. Tax Co. v. Board of County Comm'rs of Okmulgee County, 187 Okla. 223, 102 P.2d 148 (1940); Abernathy v. Huston, 166 Okla. 184, 26 P.2d 939 (1933) (ordinarily the fraud essential to vacate a judgment on direct attack must be actual fraud, but the use of constructive fraud is permitted); Brown v. Trent, 36 Okla. 239, 128 P. 895 (1912).

D.

IT IS AN ABUSE OF DISCRETION TO GRANT A VACATION QUEST ON THE GROUNDS OF FRAUD WITHOUT FIRST EVALUATING THE PETITION IN LIGHT OF EQUITABLE LIMITATIONS ON OBTAINING THE RELIEF REQUESTED

¶36 Patel seeks relief from a judgment on the basis of acts of fraud allegedly occurring during the course of a trial at which she was present and participated. Her petition to vacate and other pleadings in the vacation quest show that at the time of the Patel I trial, Patel had what she believed to be reliable information that defendants' representations to the court about her credentialing file were false and misleading. Patel objected to the admission of Exhibit 1 and informed the court of her belief that the file contained another document which would contradict the document being offered into evidence by defendants. Although Patel never withdrew the objection, she did not ask for a delay or continuance in the trial to review the file for the document she believed it contained, nor did she stand on her objection when the court arrived at its compromise permitting Patel to testify about Exhibit 1. In fact, the record reflects that the court would have been justified in interpreting her response as acquiescence in the granted compromise.

¶37 A vacation quest must be evaluated in light of the principle of the finality of judgments.[53] That principle, conceptually encompassed in the various preclusion

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[53] Robinson v. Audi Aktiengesellschaft, 56 F.3d 1259, 1265 (10th Cir. 1995), *cert. denied*, 516 U.S. 1045, 116 S.Ct. 705, 133 L.Ed.2d 661 (1996).

doctrines, collides in a vacation proceeding with the principle that a fair adversary proceeding must be vouchsafed to the parties in a lawsuit. An unlimited ability to attack a judgment valid on its face would burden the judicial system with the potential for endless and repetitious litigation and jeopardize the public's and the parties' reliance on seemingly final adjudications. On the other hand, where a party has not had a reasonable opportunity to litigate a claim or defense before a court having jurisdiction, unwavering adherence to the doctrine of finality of judgments would result in unfairness and in the lowering of the judicial system in the esteem of the affected litigants as well as of the public. Neither a blanket prohibition against relief from judgments nor the mandated consideration of each and every petition to vacate is desirable or necessary. Both principles must be upheld and are best protected by placing reasonable and prudent procedural requirements on a litigant who launches a §1031 attack.

¶38 We accordingly hold that in a proceeding under §1031 to vacate an earlier judgment on the grounds of fraud, *the petitioner must:* (1) show that he (or she) acted without delay in asserting his (or her) rights after discovering the fraud, (2) establish that he (or she) used diligence in the original action in trying to discover and expose the fraud, (3) provide clear and convincing evidence of the fraud, and (4) demonstrate that there is a substantial likelihood that a new trial will have a different result. The prudential requirements we impose today on one who initiates a §1031 attack will ensure that the complaining party has not in some way helped to create, or invited, the need for a new trial and that granting a

new trial will not be a useless exercise. The absence from the record of any judicial inquiry into these prudential factors requires that the postjudgment order of vacation be reversed and the cause remanded for further proceedings.

¶39 One of the dissenters would reverse the trial court's order and direct that vacation relief be denied. It is unclear whether that dissenter considers the petition (for vacation) facially insufficient or whether he deems the defendant entitled to victory by summary relief. If it be the latter, today's withdrawal of the Rule 13 regime from the procedural arsenal the parties may invoke in a vacation proceeding *makes summary disposition unavailable* in this case.[54] If, on the other hand, the dissenter's view is that the petition's facial insufficiency requires its dismissal, he is in error. The allegations of the petition are sufficient to state a prima facie case of fraud. Until this pronouncement, no more was necessary to avoid a vacation petition's dismissal.[55] Today's opinion unveils additional fact issues to be addressed before vacation relief may be granted. Plaintiff *must be afforded an opportunity to present evidence* that would show the existence of those newly required facts. Today's remand, which assures the

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[54] The dissent does not appear to take issue with the court's treatment of Rule 13's outer limit.

[55] A petition that states a prima facie case is not subject to dismissal, unless it appears beyond doubt that the plaintiff can prove no facts to support the claim. Frazier v. Bryan Memorial Hosp. Authority, 1989 OK 73, 775 P.2d 281; Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

plaintiff of that opportunity, is indeed a constitutional imperative.[56]

E.

ALL PARTIES MUST BE AFFORDED AN OPPORTUNITY TO PRESENT EVIDENCE ON DISPUTED FACT ISSUES BEFORE A JUDGMENT MAY BE VACATED IN A PROCEEDING BROUGHT PURSUANT TO THE PROVISIONS OF §1031.

¶40 Defendants complain that error was committed in the nisi prius order vacating the Patel I judgment because they were not afforded an evidentiary hearing. Instead, *only* oral arguments were presented on the single misconceived motion for summary judgment. Defendants assert that the provisions of 12 O.S. 1991 §1034 require an evidentiary hearing before a judgment may be vacated pursuant to §1031(4).[57] Although we agree that an opportunity to offer evidence on disputed fact issues must be afforded the parties in a vacation proceeding, we disagree that it is §1034 that imposes this requirement. *Section 1034*

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[56] Minimum standards of due process require that persons be given notice and an opportunity to be heard before any of their substantial rights may be altered or affected. Matter of Estate of Pope, 1990 OK 125, ¶3, 808 P.2d 640, 642-643; Snyder v. Smith Welding & Fabrication, 1986 OK 35, ¶5, 746 P.2d 168, 170; Armstrong v. Netherlands Pipeline Const. Co., 1968 OK 170, ¶12, 447 P.2d 762, 764; Smith v. State Industrial Court, 1965 OK 179, ¶11, 408 P.2d 317, 320-321; McMinn v. State, 1961 OK 280, ¶10, 366 P.2d 954, 957.

[57] The provisions of 12 O.S. 1991 §1034 are: "The Court may first try and decide upon the grounds to vacate or modify a judgment or order before trying or deciding upon the validity of the defense or cause of action."

authorizes, but does not require, an evidentiary hearing. It merely speaks to the issues that the party seeking vacation must meet and sets up the order in which the court may consider the parties' contentions. *The court must determine that there is a statutory ground for vacating the judgment and that the petitioner has an available defense or cognizable cause of action.*

¶41 Nevertheless and apart from §1034, where the dispositive issues in a vacation quest call upon the trial court to resolve one or more fact controversies, an opportunity to adduce proof must be provided. The Constitution inexorably commands that no one's rights are to be adversely affected by judicial process that takes place in the absence of notice and a full and fair opportunity to be heard.[58] In the vacation proceeding under review today, the court is called upon to determine fact issues relating to fraud as well as fact issues relating to the prudential restrictions on vacating judgments which are set forth in today's opinion. On these disputed fact issues the parties must be afforded an opportunity to present evidence.

¶42 An appellate court cannot make first-instance decisions.[59] In the battle of motions waged by the parties

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[58] *See*, PFL Life Ins. Co. v. Franklin, 1998 OK 32, ¶9, 958 P.2d 156, 162.

[59] When necessary finding of facts and conclusions of law are absent, the case must be remanded with directions that they be made by the trial court. Toxic Waste Impact Group, Inc. v. Leavitt, 1994 OK 148, 890 P.2d 906, 913; Dyke v. Saint Francis Hospital, Inc., 1993 OK 114, 861 P.2d 295, 300, n.13; Teel v. Teel, 1988 OK 151, 766 P.2d 994, 999, n.19; American Ins. Ass'n v. American Nat. Bank, 1984 OK 13, 680 P.2d 983, 993; Matter of Estate of Bartlett, 1984 OK 9, 680 P.2d 369, 377; Davis v. Gwaltney, 1955 OK 362, 291 P.2d 820, 824.

in this case, unresolved fact issues went undetected. The trial court's failure to receive evidence on these disputed issues makes her decision (to vacate the Patel I judgment) premature and constitutes an abuse of discretion. We therefore remand Cause No. 90,489 to the court of first instance to undertake an inquiry into, and make its determination on, the disputed critical fact issues.[60]

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[60] In sum, the court's affirmance of her nisi prius victory (in Cause No. *90,489*) is *not Patel's due on this record.* Submission of her quest for relief upon deficient proof *mandates today's reversal.* Upon Patel must fall the loss from the found probative infirmity. Hers was the duty to supply the evidentiary basis for the vacation order. Gavin v. Heath, 125 Okl. 118, 256 P.745, 746 (1927). One on whom the law casts the burden of producing proof for the relief sought bears the risk of failed (or substandard) production. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 272, 114 S.Ct. 2251, 2255-2256 129 L.Ed.2d 221 (1994). Patel's defeat by today's pronouncement *need not be irreversibly final.* Remand for further nisi prius proceedings *will* afford her the opportunity to supply the deficiency. The proof she needs, now absent from the record, does not appear to be clearly beyond her ability to secure upon remand. Sherrill v. Sovereign Camp, W.O.W., 184 Okl. 204, 86 P.2d 295, 296 (1939); Guinn v. Church of Christ of Collinsville, 1989 OK 8, 775 P.2d 766, 775.

IV

NO CIVIL REMEDY IS AVAILABLE FOR LITIGATION-RELATED MISCONDUCT[61]

¶43 In the second case under review today, we are asked to reverse the dismissal of Patel's tort action for failure to state a claim. In that action damages were sought for defendants' alleged fraud, deceit, perjury, and spoliation of evidence in the Patel I trial. In reviewing a *nisi prius* disposition by dismissal, the issues stand before this court for *de novo* review. The purpose of a motion to dismiss is to test the legal sufficiency of the pleadings, not to evaluate the underlying facts.[62] The question

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[61] The court's holding today is not governed by the civil remedy contemplated by the provisions of the criminal statute found at 21 O.S. 1991 §575. Its provisions state:

> "Every attorney who, whether as attorney or as counselor, who:
>
> 1st, is guilty of any deceit or collusion, or consents to any deceit or collusion with intent to deceive the court or any party; . . . is guilty of a misdemeanor; and, in addition to the punishment prescribed therefor by this code, he forfeits to the party injured treble damages, to be recovered in a civil action."

By its terms, §575 *is not applicable to this case.* The civil remedy authorized there *requires an antecedent criminal conviction.* No criminal proceeding has been instituted against these defendants. We express no opinion in regard to the viability of a civil action if one is brought pursuant to the terms of this statute.

[62] Zaharias v. Gammill, 1992 OK 149, ¶6, 844 P.2d 137, 138. According to Professor Fraser, a petition is sufficient under the Oklahoma Pleading Code if it discloses "the existence of the necessary elements of a legally recognized claim or cause of action." George B. Fraser, The Petition Under the New Pleading

before us is hence whether, taking all of plaintiff's allegations as true, she is precluded from recovering as a matter of law. We hold that she is barred.

¶44 In *Cooper v. Parker-Hughey*,[63] this court held that in this state no civil action may be maintained for damages caused by perjury, whether the petition for damages refers to the tort as perjury or as fraud or deceit. The court's holding in *Cooper* reasoned that perjurious testimony constitutes a fraud or deceit on the finders of fact and on the judicial system as a whole, and not on an individual litigant. The court looked to the common law, the Oklahoma Constitution, and to Oklahoma statutory provisions. It found there no support for the adoption of

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Code, 38 OKLA. L. REV. 245, 246 (1985). A petition can generally be dismissed only for lack of any cognizable legal theory or for insufficient facts under a cognizable legal theory. Lockhart v. Loosen, 1997 OK 103, ¶4, 943 P.2d 1074, 1077; Washington v. State ex rel. Department of Corrections, 1996 OK 139, ¶7, 915 P.2d 359, 361; Indiana National Bank v. State Department of Human Services, 1994 OK 98, ¶2, 880 P.2d 371, 375. A motion to dismiss for failure to state a claim upon which relief can be granted will not be sustained unless it should appear without doubt that the plaintiff can prove no set of facts in support of the claim for relief. A-Plus Janitorial & Carpet Cleaning v. The Employers' Workers' Compensation Association, 1997 OK 37, ¶9, 936 P.2d 916, 922; National Diversified Business Services, Inc. v. Corporate Financial Opportunities, Inc., 1997 OK 36, ¶9, 946 P.2d 662, 665; Delbrel v. Doenges Bros. Ford, 1996 OK 36, ¶3, 913 P.2d 1318, 1320. The court must take as true all of the challenged pleading's allegations together with all reasonable inferences which my be drawn from them. Great Plains Federal Savings and Loan Association v. Dabney, 1993 OK 4, ¶2, n.3, 846 P.2d 1088, 1090, n.3.

[63] 1995 OK 35, 894 P.2d 1096.

a tort remedy to provide damages for perjury. To the extent Patel's petition relies on perjurious testimony as the basis of her claim for damages, whether denominated perjury, fraud, deceit, or "prima facie tort", the petition fails to state a claim. It was properly dismissed.

¶45 Patel also claims damages for spoliation of evidence, denominating her claim either spoliation of evidence or prima facie tort. Neither spoliation of evidence nor prima facie tort (for acts constituting spoliation of evidence) has ever been recognized by this court as actionable. Because the conduct complained of in this action does not present a case of spoliation of evidence, we need not consider today whether that tort should be recognized as a viable cause of action in this state.

¶46 Spoliation is defined as "[t]he destruction of evidence. . . . The destruction, or the significant and meaningful alteration of a document or instrument."[64] Spoliation occurs when evidence relevant to prospective civil litigation is destroyed, adversely affecting the ability of a litigant to prove his or her claim. Although a few jurisdictions have adopted the tort of spoliation,[65] most of the courts which have considered the issue have refused

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[64] BLACK'S LAW DICTIONARY 1257 (5th ed. 1979).

[65] Bondu v. Gurvich, 473 So.2d 1307 (Fla. Dist. Ct. App. 1984), *rev. denied*, 484 So.2d 7 (Fla.1986); Hazen v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986); Viviano v. CBS, Inc., 251 N.J.Super. 113, 597 A.2d 543 (1991), *cert. denied*, 127 N.J. 565, 606 A.2d 375 (1992); Smith v. Howard Johnson Co., 67 Ohio St.3d 28, 615 N.E.2d 1037 (1993).

to recognize spoliation as an independent cause of action in tort.[66]

¶47 No destruction or alteration of a document or instrument took place in this case. The allegedly wrongful conduct here consists of defendants' failure to respond fully in the course of discovery and of the oral misrepresentation at trial by defendants' attorney as to the existence of a document in Patel's credentialing file. Adequate remedies for this conduct exist. One such remedy, a vacation quest, Patel is currently pursuing. If she is successful in vacating the Patel I judgment, discovery or other sanctions for the defendants' litigation-related misconduct in the original case may, if warranted, be imposed in the reopened case. Apart from remedies available within the existing case, a party aggrieved by litigation-related misconduct may seek to invoke sanctions available under the criminal law and, in the case of attorney misconduct, by bar disciplinary measures.[67] The trial court correctly dismissed this claim.

V

SUMMARY

¶48 The provisions of 12 O.S.1991 §1031 et seq. provide a legislatively created mechanism for relief from judgments. The fourth ground for relief under §1031 – fraud practiced by the successful party in obtaining the judgment – is available *whether the alleged fraud is regarded*

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[66] Trevino v. Ortega, 969 S.W.2d 950 (Tex. 1998) and cases cited therein at 952.

[67] *See, e.g.* 21 O.S. 1991 §575.

as extrinsic or intrinsic. Patel's allegations fall within the meaning of §1031(4). It remains for her to convince the nisi prius court that she was unable at any point in course of the Patel I trial proceedings to neutralize the adverse effects of the fraud, and that the fraud so contributed to reaching the verdict against her that in its absence she would probably have prevailed on her cause of action. Finally, while we acknowledge the seriousness of litigation-related misconduct such as that alleged in Patel III, we explicitly decline today to provide redress for that civil harm *through the adoption of a new tort.* The available remedies, including the relief Patel seeks in the Patel II proceeding, are sufficient.

¶49 THE TRIAL COURT'S POSTJUDGMENT ORDER IN CAUSE NO. 90,489 VACATING THE PATEL I JUDGMENT IS REVERSED AND THE CAUSE REMANDED FOR FURTHER PROCEEDINGS TO BE CONSISTENT WITH TODAY'S PRONOUNCEMENT; THE TRIAL COURT'S ORDER OF DISMISSAL IN CAUSE NO. 89, 582 IS AFFIRMED.

¶50 HODGES, LAVENDER, OPALA, WILSON, KAUGER, and **WATT,** JJ., concur;

¶51 HARGRAVE, V.C.J., concurs in result;

¶52 SUMMERS, C.J., and **SIMMS,** J., concur in part and dissent in part.

SIMMS, J., CONCURRING IN PART AND DISSENTING IN PART:

I agree with the majority that no civil remedy for the alleged litigation misconduct is available and I concur in affirming the trial court's dismissal of Patel III, case number 89,582. Additionally, I agree with the majority that the trial court abused its discretion in vacating the judgment in Patel I, case number 90,489. That judgment was final and plaintiff's allegations in support of her vacation petition, even if proven, were insufficient to sustain her action and the trial court's decision in her favor. I would not remand the matter for an additional hearing, however. Instead I would reverse the trial court's judgment in favor of Patel and direct the trial court to enter judgment in favor of the defendants. Plaintiff bore the burden to prove her case. See e.g. Gavin v. Heath, 125 Okl. 118, 256 P. 745 (1927). She had the opportunity to establish her case but, by any and all measures, she failed to do so, and the trial court's ruling in her favor was clearly an abuse of discretion. The defendants' motion to dismiss should have been sustained. The majority's stated concern with the denial of a sufficient opportunity for **defendants** to put on their case in defense of the petition to vacate is, therefor, strained and unconvincing and lends no credence to this disposition. The majority errs in granting Patel this additional chance to try and make her case against defendants, and I fear this "new" view of fraud created here to govern the trial on remand will create much confusion in this previously settled area of law.

SUMMERS, C.J., Concurring in part and dissenting in part.

¶1 I concur in the Court's opinion disposing of appeal no. 89,582.

¶2 As to appeal no. 90,489, I concur with most of what the Court has said regarding the law applicable to that matter. I dissent, however, from remand. Defendants were given the opportunity to offer further submissions, and stood silent. I believe at that point in time the trial court and all parties justifiably concluded that the matter stood fully submitted. I would affirm the trial court.

APPENDIX B

IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

URVASHI B. PATEL, Plaintiff, v. OMH MEDICAL CENTER, INC., an Oklahoma corporation, ST. FRANCIS HOSPITAL, INC., an Oklahoma corporation, and JOHN B. STEVENS, an individual, LARRY D. HENRY, an individual and ARRINGTON KIHLE GABERINO & DUNN, INC., Defendants.	)	Case No. CJ-97-00928 Judge David Peterson

JUDGMENT

(Filed June 3, 1997)

Now on this 14th day of May, 1997, Defendants' Motion to Dismiss comes on for hearing. Present for the Plaintiff was Clifford N. Ribner and present for Defendants was Larry D. Henry and Vivian C. Hale. After reviewing the briefs submitted by the parties and having heard arguments of counsel, the court finds, based upon current Oklahoma case authority, that Defendants' Motion should be granted for the reason that Plaintiff fails to state a claim upon which relief can be granted,

and that Plaintiff's Petition should be dismissed as against all Defendants.

IT IS THEREFORE, ORDERED, ADJUDGED and DECREED that Plaintiff's Petition be dismissed with prejudice against all Defendants.

/s/ David L. Peterson 5-23-97
HONORABLE DAVID L. PETERSON
TULSA COUNTY DISTRICT COURT

APPROVED AS TO FORM:

/s/ Clifford M. Ribner
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ATTORNEY FOR PLAINTIFF

/s/ Vivian C. Hale
Larry D. Henry, OBA #4105
Vivian C. Hale, OBA #14241
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ATTORNEYS FOR DEFENDANTS

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Thursday, September 30, 1999

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

90,489 Urvashi B. Patel v. OMH Medical Center, Inc., an Oklahoma corporation, Saint Francis Hospital, Inc., an Oklahoma corporation and John B. Stevens, an individual.

89,582 Urvashi B. Patel v. OMH Medical Center, Inc., an Oklahoma corporation, Saint Francis Hospital, Inc., an Oklahoma corporation, Larry D. Henry, an individual and Arrington, Kihle, Gaberino & Dunn, Inc.

Petitions for rehearing are denied.

CONCUR: Hargrave, V.C.J., Hodges, Lavender, Opala, Kauger, Watt, JJ.

DISSENT: Summers, C.J., Simms, J.

* * *

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

URVASHI B. PATEL PLAINTIFF/APPELLANT	)	
vs.	)	No. 89582
OMH MEDICAL CENTER, INC., an Oklahoma corporation, ST. FRANCIS HOSPITAL, INC., an Oklahoma corporation, Larry D. Henry, an individual and Arrington, Kihle Gaberino & Dunn, Inc.,	)	Trial Court No. CJ 97-00928
DEFENDANTS/ APPELLEES	)	

PLAINTIFF DR. PATEL'S PETITION FOR REHEARING AND BRIEF IN SUPPORT

(Filed May 17, 1999)

Plaintiff, Dr. Patel, the Appellant in this case ("Plaintiff") Petitions this Court to Rehear this matter, to withdraw the Opinion in this case filed herein on April 27, 1999, and reverse Judge Peterson's dismissal of this case, pursuant to Oklahoma Supreme Court Rule 1.13, for the reasons stated below.

SUMMARY OF THE ARGUMENT

In failing to reverse Judge Peterson's decision in this case ("Patel III"), the Court, has (1) misperceived the weight and trend of directly-contrary legal authority in other jurisdictions, (2) over-extended the logic and reach of *Cooper v. Parker-Hughey*, 1995 OK 35, 894 P.2d 1096, *directly contrary* to clearly-legislated public policy that could not be of longer standing, 21 O.S. 1910§ 575, and (3) completely ignored the fact that *substantially less* egregious misconduct than that alleged in the Patel III Petition would indeed be actionable as essential components of malicious prosecution or abuse of process cases if committed by a *plaintiff* in furtherance of an indefensible legal position in *her* case, rather than the Defendants who did such in this case. There is no rational basis for such distinction and, accordingly, the Court's Opinion is unconstitutional for that reason alone as a violation of Plaintiff's federal and Oklahoma Due Process rights. Additionally, the Court (4) ignored long-standing prior teachings of this Court which *specifically permit* and encourage the recovery of damages and other compensation (qui tam-type rewards) for litigation *correcting public wrongs*, such as the *both* public and private wrongs alleged in the Patel III Petition.

ARGUMENT

I. JUDGE PETERSON'S RULING IN PATEL III MUST BE REVERSED AND PLAINTIFF'S PETITION THEREIN REINSTATED

Defendants' Exhibit 1 was not simply one, complete document out of many in a larger file of documents *others*

of which had the effect of "refuting" it: it was in fact *physically attached* to all such other documents on the only occasions when it was actually even seen by anyone other than Karen Legg – i.e. the OMH Board of Directors. Accordingly, Defendants' offering of their Exhibit 1 in such form did, as a factual matter, indeed constitute spoliation, as Judge Wiseman ruled they knew, because by *deliberately omitting the remainder of the larger document of which Exhibit 1 comprised but a fragment*, and by knowingly misrepresenting to Judge Wiseman that such document in fact was a complete document in and of itself, Defendants in fact presented both the jury and Judge Wiseman with a *defaced fragment*, the *remainder* of whose contents proved the falsity of the *portion* offered. Accordingly, the Court erred in assuming that *no* spoliation, within even the limited definition of such term this Court adopted, occurred here.

A. No Other State Has Prophylactically Immunized The Misconduct Described in the Patel III Petition.

Not a single American jurisdiction has found *no* actionable misconduct in the extraordinary circumstances of Patel III – that is, where active fraud on the Court in the form of spoliated documents, perjured testimony and false representations made directly to the Trial Court herself were willfully effected both by a party *and* its attorneys and resulted in damage to Plaintiff's property by destroying her case, since such frauds remained undiscovered, through Defendants' continuing concealment of them, until after the Judgment became final. As noted

most recently in Solum and Marzen, "Destruction of Evidence in Civil Litigation", Koeltel and Kiernan, editors, *The Litigation Manual Pretrial*, American Bar Association Section of Litigation:

> Courts in 25 other jurisdictions have had an opportunity to pass on the spoliation-of-evidence tort. Courts in eight states besides California have explicitly recognized the new tort. Those states are Alaska, see *Hazen v. Municipality of Anchorage*, 718 P.2d 456 (Alaska); Florida, see *Bondu v. Gurvich*, 473 So.2d 1307 (Fla. Dist. Ct. App. 1984); Illinois, see *Miller v. Gupta*, 672 N.E.2d 1229, 1232-33 (Ill. 1996) (Recognizing negligent spoliation tort in medical malpractice context); New Mexico, *Coleman v. Eddy Potash, Inc.*, 905 P.2d 185 (N.M. 1995); Ohio, see *Smith v. Howard Johnson Co.*, 615 N.E.2d 1037, 1038 (Ohio 1993); and Texas, *Ortega v. Trevino*, No. 13-94-577-CV, 1997 WL 35455, *5 (Tex. Ct. App. Jan. 30, 1997) (not released for publication) (reversing trial court's dismissal of lawsuit on ground that spoliation tort is not recognized and stating "we see no reason why Texas should not protect the plaintiff's property right in a prospective civil claim in a similar fashion by adopting the independent tort for spoliation of evidence in an appropriate factual situation").[1]

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[1] The case noted in the quoted article has subsequently been reversed *sub nom Trevino v. Ortega*, 969 S.W.2d 950 (Tx. 1998), a ruling specifically noted in footnote 66 of the Court's Opinion. This Court apparently draws comfort from *Trevino*, apparently viewing it as consistent with its ruling in this case. In fact, nothing could be further from the truth.

First of all, *Trevino* involved document destruction *by a party alone*, without any suggestion of any attorney involvement in

An Indiana court also has recognized that the tort of intentional interference with civil litigation by spoliation may be available if the plaintiff can show "an independent tort, contract, agreement, or special relationship imposing a duty to the particular claimant," *Murphy v. Target Products*, 580 NE.2d 687, 689 (Ind. Ct. App. 1991), but Indiana courts have yet to be presented with an appropriate case for application of the tort. A New Jersey court has recognized

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such. Such document destruction was discovered by the moving party before trial, while discovery was still pending and such party – the plaintiff in *Trevino* – filed a completely separate lawsuit alleging damage *solely* from such spoliation: his case had not yet even been tried, let alone *lost*, as here, as the result of such misconduct. On such facts, the Texas Supreme Court ruled that "spoliation does not give rise to independent damages and *because it is better remedied in the lawsuit affected by the spoliation* we decline to recognize spoliation as a tort cause of action." [emphases added] 969 S.W.2d at 951.

Accordingly, *Trevino* differs materially from the present case in several respects: (1) the original case was still on-going at the time it was filed and, more importantly, (2) there was neither any attorney-involvement in such misconduct (3) nor any indication that the plaintiff therein had suffered any detriment specifically due to detrimental *reliance* on such misconduct, nor did such misconduct otherwise include the other elements of fraud. Additionally, there is no indication that the Supreme Court of Texas considered the question raised in this Petition for Rehearing of whether it is constitutionally *permissible* to permit *disparate remedies* to parties *identically* defrauded in judicial proceedings depending on whether they are defendants or plaintiffs, as Oklahoma clearly would if the Opinion is not withdrawn. Accordingly, *Trevino* provides no support for this Court's ruling precluding *any* cause of action for the misconduct *and resulting damage* described in the Patel III Petition.

the closely analogous tort of "willful concealment of evidence." See *Viviano v. CBS, Inc.*, 597 A.2d 543 (N.J.Super. Ct. 1991). With California, those decisions bring to nine the number of states that have explicitly recognized some version of the spoliation tort.

Courts in twelve more states have discussed the spoliation tort, but found it unnecessary to decide whether a distinct spoliation tort existed on the facts of the cases before them. Those states are Alabama, see *Christian v. Kenneth Chandler Construction Co., Inc.*, No. 1930517, 1995 WL 86486 (Ala. Mar. 3, 1995); *Peek v. State Auto Mutual Insurance Co.*, No. 1930505, 1995 WL 86454 (Ala. Mar. 3, 1995); Arizona, see *La Raia v. Superior Court*, 722 P.2d 286 (Ariz. 1986); Georgia, *Gardner v. Blackston*, 365 S.E.2d 545 (Ga. App. 1988); Idaho, *Murray v. Farmers Insurance Co.* 796 P.2d 101 (Idaho 1990); *Michigan, Panich v. Iron Wood Products Corp.* 445 N.W.2d 795 (Mich. Ct. App. 1989); Minnesota, *Federated Mutual Insurance Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434 (Minn. 1990); Missouri, *Brown v. Hamid*, 856 S.W.2d 51 (Mo. 1993); Pennsylvania, *Olson v. Grutza*, 631 A.2d 191 (Pa. Super. Ct. 1993); Washington, *Unigard Security Insurance Co. v. Lakewood Engineering & Manufacturing corp.*, 982 F.2d 363 (9th Cir. 1992); and West Virginia, *Taylor v. Ford Motor Co.*, 408 S.E.2d 270, 271 (W. Va. 1991). The United States District Court for the District of Columbia, in *Wilder-Mann v. United States* Civ. A. No. 87-2392 SSH, 1993 WL 260700 (D.D.C. June 28, 1993), and a Wisconsin intermediate appellate court, in *Ely v. St. Luke's Hospital* " 514 N.W.2d 878 (table), 1994 WL 24352, *2 (Wis. Ct. App. 1994) (Unpublished opinion), declined to predict how

their jurisdictions' highest courts would rule and, because they were unwilling to create a new cause of action, did not recognize the tort of spoliation of evidence in the cases before them.

Decisions in three other states have left the law unsettled, but suggest that the spoliation tort might exist – at least in some circumstances. In Maryland, the Court of Special Appeals, in *Miller v. Montgomery County*, 494 A.2d 761 (Md. Ct. Spec. App. 1985), declined to recognize the spoliation-of-evidence tort in cases in which the spoliator was a party, but left open the possibility that an action could be maintained against a spoliator not a party to the underlying litigation. Conversely, the Kansas Supreme Court, in *Koplin v. Rosel Well Perforators, Inc.* 734 P.2d 1177 (Kan. 1987), rejected the tort for cases in which the spoliator was not a party to the underlying cause of action, but left open the possibility that the tort might be recognized in other circumstances. The United States District Court for the District of Kansas predicted that the Kansas Supreme Court "would recognize the tort of spoliation under some circumstances." *Foster v. Lawrence Memorial Hospital*, 809 F.Supp. 831, 837 (D.Kan. 1992); see also *OMI Holdings, Inc. v. Howell* 918 P.2d 1274, 1285 (Kan. 1996) (Stating without disapproval that "the *Foster* court concluded that the Kansas Supreme Court would recognize the tort of spoliation if the defendant already owes an independent duty to the plaintiffs to preserve the evidence and this duty is not a new common-law duty imposed on the defendant as part of the tort". The United States District Court for the District of Arkansas likewise determined that the Arkansas courts would

recognize the spoliation tort if the defendant owed a preexisting duty to preserve evidence, but that court's decision is not binding determination of Arkansas law. See *Wilson v. Beloit Corp.*, 921 F.2d 765 (8th Cir. 1990).

One state has unambiguously rejected the tort of spoliation of evidence. Under Louisiana's unique civil law system, an intermediate appellate court held that the spoliation tort is not an appropriate analytical tool and therefore is not an independent cause of action. See *Kammerer v. Sewerage and Water Board of New Orleans*, 633 So. 2d 1357 (La. Ct. App. 1994). In the United States District Court for the Northern District of New York, *Spano v. McAvoy*, 589 F.Supp. 423 (N.D.N.Y. 1984), the court considered whether the spoliation tort created a property interest protected by the Due Process Clause, U.S. Const. Amend. XIV, § 1983 (1982), and concluded that it did not.

In sum, the spoliation tort exists in nine states, may exist in three more states, and definitely does not exist in one. Twelve jurisdictions (11 states and the District of Columbia) have considered but have not ruled on whether the tort exists. The tort has yet to receive any serious consideration in the remaining 26 states."

Thus, a mid-level Louisiana court *alone* has even *suggested* that *all* the attorney-complicit fraudulent misconduct alleged in the Patel III Petition is not actionable under any rubric. If this Court truly wishes to find itself literally as a minority of one in *completely immunizing* such extraordinary misconduct from litigation it should do so explicitly and not base its ruling on an assumption that it is following any non-existant judicial trend.

The Court's principal rationale for sustaining Judge Peterson's ruling in Patel III is that it purports to follow *Cooper v. Parker-Hughy*, supra. Although it is true that it does indeed follow dictum in that case, the Court does a good deal more than that.

Moreover, rather than extending *Cooper* in such fashion, this Court should take the opportunity of the present case properly to limit that case's application.

B. Clearly-Legislated Public Policy in Oklahoma Precludes the Immunity Granted By the Court For Plaintiff's Damage Caused By The Misconduct Alleged In the Patel III Petition.

Cooper itself, in finding plenary immunity from any other litigation for a testifying witness, rested its holding principally on this Court's belief that the legislature in Oklahoma had announced a public policy of such immunity in statutes which, by their own terms, were actually limited to providing such immunity *solely* to defamation cases. In this regard, the Court wholly misconstrues Plaintiff's reliance on 21 O.S. 1910§ 575: Plaintiff does not claim that her claims in Patel III arose solely *under that statute;* instead, Plaintiff *points* to such statute as an express legislative *repudiation* of any public policy *immunizing* judicial misconduct by attorneys, alone or in tandem with their clients, in this state.

As this Court acknowledges, Oklahoma has long recognized prima facie or indeterminate tort for fraud and other intentional or reckless acts which harm another's person or property. Such acts are clearly alleged in the Patel III Petition. It is apparent that *only* if such acts are

prophylactically *immunized because the misconduct occurred in a courtroom,* would they fail to state a claim under Oklahoma law. Since *Cooper's* holding itself rested primarily on a finding of legislatively-announced public policy, its logic simply cannot withstand the fact that 21 O.S. 1910§ 575 unambiguously provides that there is *no* such public policy permitting immunity in Oklahoma for fraud by an attorney on a court.[2]

This Court acknowledges in its Opinion that it has long recognized the tort of malicious injury or prima facie tort. It is clear that the misconduct alleged in the Patel III Petition would constitute criminal actions which indeed injured Plaintiff. Why should the fact that the public *also* is injured by such misconduct reduce or even, as the Court rules, *eliminate,* any damages Plaintiff is entitled to from such when she herself *also* clearly is injured by such misconduct?

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[2] The only way it can be argued that 21 O. S. 1910§ 575 *fails* to announce a public policy *precluding* prophylactic immunity for the Patel III Defendants would be if the Court's reading of that statute meant that such *immunity extended to all* the misconduct described therein *unless* there is a criminal conviction. However, it is clear that no such criminal conviction has ever been required for the *remaining* frauds described in that statute to be actionable; and that statute *on its face* by *expressly* providing for a civil remedy precludes any notion of *any other* prophylactic immunity for any of the misconduct described therein.

C. The Court's Opinion Violates Plaintiff's Oklahoma and Federal Constitutional Equal Protection Rights Because There Is No Rational Basis for Distinguishing Between Plaintiffs vs. Defendants Who Are Injured by Identical Misconduct.

Even more importantly, although the Court states that the misconduct alleged in the Patel III Petition has never previously been held actionable, it is absolutely clear that if *identical* – or even substantially *less* culpable – misconduct were committed by a *plaintiff* in pursuance of *her* unmeritorious legal claims, rather than by defendants, as here, such misconduct would indeed be actionable independently by the injured party as an essential part of a suit for malicious prosecution and/or abuse of process. *See* OUJI Instruction No. 16.6, providing that malice is shown for such purpose when an "action[that is, a case has] "been done . . . willfully in a wanton or oppressive manner, and in conscious disregard of the other's rights." If the blatant, fraudulent misconduct described in the Patel III Petition, all of which, as described therein, was conducted in pursuit of an utterly meritless legal position, does not satisfy that instruction's test, what does?

It is indisputable that a plaintiff whose litigation rights are destroyed through the attorney-complicit litigational misconduct alleged in the Patel III Petition suffers *both* a public *and* a private injury *identical* to that of such a defendant who is subjected to litigation misconduct by a plaintiff sufficient to give rise to such long-standing torts. Why should defendants be given free access to the courts for identical, though *lesser* misconduct, while plaintiffs are, under the Court's Opinion, utterly barred?

It is probable that if the legislature legislated in such manner, such would constitute both a violation of the federal Constitution's Equal Protection clause and Article II, § 6 of the Oklahoma Constitution.[3] It is clear that this Court cannot constitutionally act in a manner which the legislature would be forbidden to do. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930) (judicial branch equally bound by constitutional limitations as legislative branch). The Court offers no explanation which could even arguably support a rational basis for a more favorable treatment for defendants than plaintiffs injured in these circumstances.

D. The Fact That Defendants, In Injuring Plaintiff As Alleged In The Patel III Petition, Also Committed a Public Wrong Does Not Immunize Such Misconduct from Plaintiff's Private Litigation Under Long-Established Oklahoma Precedents.

Additionally, this Court has long recognized that compensation is indeed warranted for effectively serving as a "private attorney general", benefiting others. *City National Bank and Trust Co. v. Owens*, 565 P.2d, 4, 7 (Okla. 1977), *expressly adopting and citing with approval Mills v. Electric Auto-Light Co.*, 396 U.S. 375, 90 S. Ct. 616 (1970), to this effect.

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[3] Article II, § 6 expressly provides, in language directly applicable here, as follows: "The Courts of justice of the State shall be open to every person, and speedy and certain remedy afforded *for every wrong and for every injury to person, property* or reputation . . . [emphases added]"

Indeed, this Court has previously acknowledged that *it does not matter* if a plaintiff receives a windfall from a defendant if such *also* serves a public purpose of punishing the wicked:

> "We have on many occasions emphasized this legislative policy declaration in recognition of *the purpose punitive damages is to serve: punishment* of the offender *and the deterence of others, for the benefit of society,* from the commission of like wrongs. *Although punitive damages may result in a windfall for the plaintiff,* the primary ultimate benefit of such damages accrues to the community as a whole. It is an imposition of restraint on the potential transgressor." [Emphases added] *Dayton-Hudson Corporation v. American Mutual Life Insurance Co.*, 621 P.2d 1155, 1158-1159 (1980)[4]

Accordingly, since the legal and logical underpinnings of *Cooper* are *directly inapplicable* to the Patel III Petition in face of the clear applicability of the policies expressed in 21 O.S. § 575 to such pleadings and since

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[4] Oklahoma law has long permitted multiple recoveries by plaintiffs for the *identical* injury if, due to the applicability of one policy or another, the Defendant simply has *no right to complain* of such. *See Denco Bus Line v. Hargis*, 229 P.2d 560, 204 Okla. 339 (1951) (merely negligent defendant entitled to *no* set-off for damages owed plaintiff where plaintiff *had already collected* such damages from insurer none of whose premiums were paid by defendant.) Quaere: Why should the fact, clearly recognized by the Court in its Opinion, that the actions complained of in the Patel III Petition *also* constitute an injury to the public *preclude* plaintiff from compensation for the damages Defendants clearly caused her?

long-standing holdings of this Court itself have unambiguously recognized that intentional, let alone illegal, actions which injure someone in their person or property are indeed actionable, this Court should state the reason in logic or morals – since there is none in law – for its findings of absolute immunity from litigation for even such egregious misconduct.

E. No Public Policy Considerations Warrant The Immunity Granted By The Court For the Misconduct Alleged In The Patel III Petition.

It appears that the Court, in its Opinion, may have been concerned with endless, harassing litigation plaguing attorneys and parties and, to avoid such, fashioned the prophylactic rule of immunity announced in its Opinion. If such is the basis for the ruling, the Court should so state. However, if such is indeed even a partial basis for the Court's ruling, the Court should recognize that we already have sufficient *actual-experiential* evidence to support the conclusion that any such concerns are utterly baseless.

This is because, as indicated above, defendants who are injured by litigational misconduct by opposing plaintiffs, alone or in tandem with their attorney (*Keel v. Hainline*, 331 P.2d 397 (Okla. 1958))[5], *already* have long had

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[5] *Keel v. Hainline* expressly permits the imposition of liability as joint tortfeasors against *each party* who aids and abets another. The Appendix to Restatement (Second) of Torts expressly acknowledges *Keel* as a *source* for §§ 875 and 876 which provide for such liability for all persons who act in

recourse to such lawsuits under the rubric of malicious prosecution or abuse of process. Actual experience has proven that such lawsuits are exceedingly rare.

Moreover, rather than indicating any *concern* about such floodgates of litigation in the context of injured defendants, this Court recently significantly *expanded* the circumstances in which suits for malicious prosecution are permissible. *Neely v. First State Bank*, 1998 OK 119 (malicious prosecution case allowed where earlier case was mere arbitration proceeding against malicious prosecution plaintiff's *employer*, not against that plaintiff himself). In light of this Court's *expansion* of such malicious prosecution claims, it is particularly inexplicable for this Court to narrow *to the point of complete elimination* claims such as Plaintiff's in Patel III.

The Court's Opinion reflects concern for possibly excessive, and at least duplicative, sanctions and damages being imposed on defendants such as those described in the Patel III Petition. It is difficult to image objects less worthy of this Court's solicitousness than perpetrators of the willful, multiple acts of judicial defilement clearly described in the Patel III Petition. Moreover,

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concert in commiting a single tort. Although OUJI Instruction No. 16.9 permits an affirmative defense if a party engages in misconduct in litigation "on advice of a lawyer", such reliance must be "honest" and based on full disclosure, as expressly provided therein. Where, as specifically alleged in the Patel III Petition, a party and its attorney act in concert in effecting their misconduct and both do so together *knowingly*, so that *neither* is honest in so doing, it is clear that not only is such affirmative defense unavailable, they would *each* be liable as joint tortfeasors for such misconduct under *Keel*.

as indicated above, in many contexts, this Court has long permitted, if not actively encouraged, the imposition of such multiple sanctions and damages for the same act against persons who simply had no right to complain of such.

Even more to the point, if the shoe were on the other foot and the Plaintiff, in pursuit of an unmeritorious case, had committed the acts described in the Patel III Petition, she clearly would be subject to sanctions under 12 O.S. §§ 2011, 3237(E) and 3237(B). And, indeed, the predicate finding of misconduct a trial court would have to make antecedent to imposing such sanctions would itself almost certainly be *res judicata* concerning some, if not all, the facts required for the imposition of damages in a *subsequent* malicious prosecution lawsuit. *See Oxy USA, Inc. v. Chevron USA, Inc.*, 1999 OK 14, *expressly permitting* such *res judicata* effect even for determinations in a mere, prior arbitration proceeding. Additional damages would, of course, be allowed in such lawsuit, including possible punitive damages.

Fortunately, civil cases involving egregious, probably criminal misconduct by defendants and their attorneys are exceedingly unusual. However, on those rare occasions when such heinous misconduct is presented to a court for adjudication, far from being in any respect *unusual*, imposing such draconian, civil consequences on malefactors is actually the norm, particularly when their misconduct consists of defilement of the very judicial system from whom they might presume to demand sympathy.

Moreover, the prospect of such multiple sanctions serves a valuable public purpose: If those who intend to defile the judicial system are able too precisely *to calculate in advance* the potential dollar consequences of their misconduct, particularly when compared to the usual improbability of such misconduct being *detected* too many circumstances might arise when many might consider such misconduct to be *within the range of acceptable risk*, particularly in extremely high-stakes litigation, a result this Court would no doubt seek to prevent.

Additionally, even if the Court actually thinks there is some public policy reason to limit an injured plaintiff from suing opposing parties and their attorneys for even the most outrageous litigational misconduct, the Court should recognize that there are substantial *competing public policy* interests which the Court's Opinion has the effect of *prophylactically silencing*.

First of all, the *very rarity* of cases such as one described in the Petition in Patel III – it being the *only similar* one to ever have arisen in Oklahoma, to the undersigned's knowledge – suggest that the floodgates of litigation against attorneys and parties is highly unlikely to be significant if this Court were to reverse Judge Peterson. Although litigation can, of course, be vexatious, fraud on the court is profoundly *more* disturbing and should be even more disturbing to the Court. If even the egregious frauds on the Court described in Plaintiff's Patel III Petition are unactionable, then it is clear that *no* fraud on *any* court would be actionable in Oklahoma no matter how egregious and no matter what damage was caused thereby.

Even if the Court is troubled by the (highly unlikely) prospect of lawyers being subjected to numerous lawsuits as a result of their in-court misconduct, the Court should consider that plaintiffs in such suits still have enormous burdens – proof by clear and convincing evidence – and can require that such plaintiffs must obtain the signature on their petitions of an attorney, subject to sanctions under 12 O.S. 1998 § 2011. It would be far better for this Court to increase enforcement of such § 2011 sanctions in Oklahoma then to provide such an extraordinary, prophylactic immunization as a cure for such problem, Such cure would create a disease that is far worse than any problem the Court could possibly hope to cure by it. It is inevitable that without reasonably likely penalties for fraud, frauds are certain to proliferate.

Patel III clearly could not have been filed in the absence of substantial, good faith knowledge of the facts alleged therein. The fact that Judge Wiseman has already found significant of such facts *to be true* shows the bona fides of such filing.

Accordingly, the effect of this Court's ruling, if left undisturbed, is that even a Petition which clearly states *true and highly provable facts* of the most egregious misconduct on a court imaginable, resulting in clear, financial damage to the property of the Plaintiff herein, have nevertheless been held not actionable in Oklahoma even though, as the Court recognizes, other, *less* culpable intentionally-injurious misconduct which results in damages to a party's property clearly is actionable. No other court has ruled the misconduct described in the Patel III Petition to be simply unactionable. No valid public policy will be served by providing the immunity provided by

this Court's Opinion and that Opinion should be withdrawn and Judge Peterson's ruling dismissing the Patel III Petition reversed.

Respectfully submitted,

/s/ Clifford N. Ribner
Clifford N. Ribner, OBA 7535
320 S. Boston, Suite 1130
Tulsa, OK 74103
(918) 582-9200

CERTIFICATE OF SERVICE

I, Clifford N. Ribner, hereby certify that on the 14th day of May, 1999, I caused a true and correct copy of the above and foregoing instrument to be deposited in the U.S. Mail, First class Postage fully prepaid thereon to the following:

James M. Sturdivant
Larry D. Henry
Gable & Gotwels
1000 OneOak Building
100 West Fifth
Tulsa, OK 74103

Honorable
David L. Peterson
District Court Judge
500 South Denver
Tulsa, OK 74103

Tulsa County Court Clerk
500 S. Denver
Tulsa, OK 74103

/s/ Clifford N. Ribner
Clifford N. Ribner

APPENDIX E

IN THE DISTRICT COURT IN AND FOR
TULSA COUNTY STATE OF OKLAHOMA

URVASHI B. PATEL, Plaintiff, vs. OMH MEDICAL CENTER, INC., an Oklahoma corporation, ST. FRANCIS HOSPITAL, INC. an Oklahoma corporation, and JOHN B. STEVENS, an individual, LARRY D. HENRY, an individual and ARRINGTON, KIHLE, GABERINO & DUNN, INC., Defendant.	Case No. CJ 97 00928 JURY TRIAL DEMANDED ATTORNEYS LIEN CLAIMED

PETITION

(Filed Febr. 24, 1997)

COMES NOW the Plaintiff, Urvashi B. Patel (the "Plaintiff") and for her Petition against each Defendant, jointly and severally, alleges and states as follows:

1. The Plaintiff is a resident of Tulsa County, State of Oklahoma.

2. The Defendant, OMH Medical Center, Inc. ("OMH"), is an Oklahoma corporation, whose principal place of business is either in Tulsa County or in Okmulgee County, State of Oklahoma.

3. The Defendant, St. Francis Hospital, Inc. ("St. Francis"), is an Oklahoma corporation, whose principal place of business is in Tulsa County, State of Oklahoma.

4. The Defendant, John B. Stevens ("JBS"), is an individual whose place of residence is presently unknown.

5. The Defendant Larry D. Henry ("LDH"), is an individual who resides in Tulsa County, Oklahoma.

6. The Defendant Arrington, Kihle, Gaberino & Dunn, Inc. ("AKG&D") is a professional corporation whose principal place of business is in Tulsa County, State of Oklahoma.

7. By Petition filed on November 29, 1993, Plaintiff initiated an action against all Defendants other than LDH and AKG&D (the "Original Defendants") to collect amounts contractually due Plaintiff from Defendant OMH and an action in tort arising out of actions taken by all those Original Defendants, acting in concert, toward the Plaintiff during 1993, in which they attempted, for their financial benefit, to blackmail her by threatening to cause irreparable damage to her professional reputation as an anesthesiologist by threatening either to withhold any favorable recommendations concerning her performance as a physician at OMH, or otherwise to slander her, unless she waived her right to all or part of a $50,000 fee to which they knew she was contractually entitled, which actions have resulted in substantial emotional and financial injury to Plaintiff ("Plaintiff's Old Case"). Defendants LDH and AKG&D served as the remaining Defendants' attorneys and agents in the Old Case. Plaintiff prevailed on her contract claims against Defendant

OMH at trial, held February 21-24, 1995, and the Defendants prevailed on Plaintiff's tort claims.

8. This is a proceeding against all Defendants, by reason, on information and belief, that all Defendants named herein obtained the portion of such Judgment dismissing Plaintiff's tort claims in her Old Case through fraud, deceit and spoliation of evidence, practiced against Plaintiff and on the Court, as described hereinafter.

9. Venue and jurisdiction are proper within the district of Tulsa County, State of Oklahoma.

10. The allegations in Plaintiff's pleadings in her Old Case immediately prior to its trial were as follows:

a. For a number of years prior to March 12, 1986, Okmulgee Memorial Hospital Authority had operated the Okmulgee Memorial Hospital in Okmulgee, Oklahoma.

b. On March 12, 1986, Defendant OMH was incorporated under the laws of Oklahoma to acquire by lease from Okmulgee Memorial Hospital Authority all the assets, properties and facilities then used in the operations of Okmulgee Memorial Hospital and for various other related purposes.

c. On March 12, 1986, the registered office for Defendant OMH was located at the same address as Defendant St. Francis in Tulsa, Oklahoma and, on information and belief, it has been the intention of Defendants OMH, St. Francis and Okmulgee Memorial Hospital Authority at all times since then that OMH be operated under the tutelage or affiliation of Defendant St. Francis. At the present time and for several years previously, Defendant St. Francis has had

a contract with Defendant OMH pursuant to which it was to furnish all managerial personnel to OMH, as loaned-out employees, including OMH's administrator, assistant administrator (if any) and chief financial officer. Also, pursuant to the same or similar contracts, Defendant St. Francis has been obligated to furnish OMH other substantial services, and has been committed to extend loans without limitation to fund operating deficits which OMH was to incur and has in fact incurred.

d. Throughout 1993, and continuing to the present time, Defendant OMH has been completely under the management and control of Defendant St. Francis, and has effectively been operated as a branch of Defendant St. Francis, by virtue of at least the following facts:

(1) Defendant St. Francis has supplied OMH with all management and control personnel, including officers and a substantial portion, if not a majority, of OMH's board of directors on a regular basis, all of whom have reported to employees of Defendant St. Francis;

(2) Defendant St. Francis has provided essential financial resources to fund OMH's ongoing operating deficits by providing OMH, on demand, with "loans" secured by OMH's assets which, on information and belief, were not commercially reasonable loans and which, if enforced in a commercially reasonable manner, would result in St. Francis foreclosing on all OMH's facilities; and

(3) By providing other services essential to OMH's functioning.

e. Notwithstanding the fact that for many years general surgery had been performed at OMH and its predecessor hospital, prior to 1992, such surgery had been performed without the services of an anesthesiologist. Instead, the hospital and its staff had relied exclusively on one or more nurse anesthetists to administer all anesthesia in connection with surgery performed there which nurse anesthetists were supervised only by surgeons who lacked any specialized knowledge of anesthesiology.

f. During 1992, on information and belief, as a result of pressure from its own board of directors and the board of directors of Defendant St. Francis, Defendant OMH decided to contract for the services of an anesthesiologist to supervise the anesthesia function being performed therein.

g. In June, 1992, OMH successfully entered into a "Physician Incentive Agreement" (the "Contract") with Plaintiff to engage her services as an anesthesiologist and as the director of anesthesia at Defendant OMH's hospital facility. The Contract had been negotiated over a period of a number of months and called for Plaintiff to begin her period of working at Defendant's hospital on August 30, 1992. That Contract was to last for a period of three (3) years, subject to the right of either party to terminate it pursuant to the following provision in Section 5.2.4 of the Contract:

> Either party may *terminate* this Agreement without reason or cause *after* Practitioner has relocated to the community by giving

the other party 120 days *advance* written notice *and* by paying a termination fee of $50,000.00 to the other. If the termination occurs after two and one-half (2 1/2) years, there shall be no termination fee for either party. During the 120 day period, each party shall continue to perform her or it's duties and obligations under this Agreement.

h. Under the Contract, throughout its term, Defendant OMH has been obligated to pay Plaintiff $17,500.00 per month on the last day of each month in advance for the next succeeding month, in addition to other cash obligations to Plaintiff thereunder.

i. At the time of negotiating the Contract, Plaintiff advised one Jerry Johnson, who was then the Administrator for Defendant OMH, and who at all times referred to herein has also been employed by Defendant St. Francis, that it was apparent that the level of business that could come her way at OMH would not be sufficient to make her presence there profitable for the hospital and, indeed, that Defendant OMH was virtually guaranteed to lose a substantial amount of money each month if she were to be paid her guaranteed salary there. Jerry Johnson acknowledged to the Plaintiff that both he and the board of directors of Defendants OMH and St. Francis were aware of this situation but that for purposes of protecting their own liability and to facilitate the hiring of additional specialized surgeons they deemed it necessary to have a person with her skills available and so were willing to lose money during the Contract period just to obtain her presence and services at OMH's hospital.

j. In late 1992, Jerry Johnson ceased to be the Administrator of Defendant OMH and was replaced in that capacity by Defendant JBS. JBS was hired as acting Administrator by OMH and St. Francis primarily to reduce what were at that time substantial net operating losses which it was incurring each month which losses were being funded by Defendant St. Francis.

k. Defendant JBS had represented himself to Defendants as, and had been employed as, a so-called "turnaround specialist", prior to becoming acting Administrator of Defendant OMH. He interviewed with both Defendant OMH and Defendant St. Francis before being hired and was approved by both.

l. Since early 1993, Defendant JBS has acted as Defendant OMH's administrator and, since August, 1993, has been an employee, in that capacity, of Defendant St. Francis who pays his salary. He has reported all his activities at OMH on a monthly basis to St. Francis personnel as well as to the OMH board of directors.

m. During July or August, 1993, the Original Defendants determined that they wished to end the expense of paying the Plaintiff under the Contract and attempted to have her gratuitously waive her rights under that Contract, which she refused to do.

n. On several occasions in October, 1993, the Original Defendants advised the Plaintiff that they were in a position to prevent her from ever receiving any but derogatory letters of recommendation concerning her performance at Defendant OMH's hospital and that they would permit her to receive favorable recommendations only if she agreed to waive all or part of

her contractual right to be paid $50,000 by OMH upon terminating her services there. This the Plaintiff refused to do.

o. On October 27, 1993, the Plaintiff specifically demanded that the Defendants furnish her with copies of all letters of recommendation previously prepared on her behalf, and specifically refused therein to waive any of her rights, including the right to the $50,000 termination payment, under the Contract, to which letters Original Defendants knew Plaintiff was entitled; Original Defendants refused and failed to deliver such letters thereby converting such letters to their own use and depriving the Plaintiff of such to her detriment.

p. By letters dated October 22, 1993 and October 25, 1993, the Defendants purported to terminate the Contract under § 5.2.4 thereof, quoted above at paragraph 14, by delivering to the Plaintiff a letter notifying her of termination. However, in direct contravention of that same clause, the Original Defendants failed to deliver to Plaintiff $50,000.00 as the advance termination fee also called for thereunder. Such $50,000.00 advance termination fee has never been paid to Plaintiff to date and, accordingly, the Contract remains in effect.

q. By letter dated March 10, 1994, Defendant OMH advised the Plaintiff of the following:

> You are hereby notified that you may absent yourself from OMH permanently and that you should not perform any services on behalf of OMH Medical Center, Inc. or its patients, employees or physicians, without prejudice to any claims you may assert

under the contract you had with OMH Medical Center, Inc. Specifically, OMH Medical Center, Inc. explicitly waives any requirement for you to perform any services or to be present at its facility after February 22, 1994.

r. On January 5 and January 6, 1994, the Plaintiff took the deposition of Defendant JBS. During the course of such deposition, JBS, on his own behalf and on the behalf of all other Defendants, repeatedly made willful and deliberate misrepresentations of material facts, while under oath, in a deliberate effort to prevent the Plaintiff from learning such material facts relating to this case and to further harm her interests thereby.

s. Defendant OMH has ceased paying Plaintiff the $17,500.00 due in advance of each month under the Contract, commencing February 22, although Plaintiff has demanded that it make such payment and, accordingly, it is presently in arrears for $35,000.00 for the payments due on February 28, and March 31, 1994.

FIRST CAUSE OF ACTION – PRIMA FACIE TORT

t. Plaintiff adopts and realleges all the preceding allegations and further pleads as follows:

u. Original Defendants, fully cognizant of Plaintiff's rights under the Contract and knowing that her career as an anesthesiologist would effectively be destroyed if they refused to provide third parties with anything other than unfavorable recommendations on her behalf, and knowing that blackmail is a criminal

offense, acting in concert committed such blackmail by so threatening the Plaintiff and thereby causing her great mental and financial injury and causing irreparable harm to her medical practice resulting in the loss of future profits therein in excess of $10,000.

v. On January 5, and January 6, 1994, when Plaintiff took the deposition of JBS, on his own behalf, and on behalf of the other Original Defendants, he deliberately and repeatedly lied about numerous facts material to this litigation in an effort to stymie the Plaintiff's case against all such Original Defendants and thereby further injured her by further inflicting additional emotional and financial injury to her in excess of $10,000.

SECOND CAUSE OF ACTION – INTENTIONAL INFLICTION OF SEVERE EMOTIONAL DISTRESS OR OUTRAGE

w. Plaintiff adopts and realleges all of the preceding allegations and further pleads as follows:

x. Original Defendants' attempt to hold Plaintiff's entire career hostage to their financial demands on her was made with full knowledge of the importance to her of her career as an anesthesiologist, the continuing importance to such career of her maintaining satisfactory reports concerning her performance at OMH, knowledge that her performance at OMH was, consistent with her performance at all prior hospitals, professionally exemplary, and such behavior of Original Defendants was outrageous and intentionally caused Plaintiff great physical and mental distress.

10. At the trial of this case, the Court permitted Defendants to introduce their Exhibit 1 based on the Court's reliance upon *very explicit* representations about that document, and about the file in which it was located, by Original Defendants through their counsel, LDH on behalf of all Defendants. The Court initially stated that Defendants' Exhibit 1 could not be admitted for *any* purpose and agreed to do so *solely* because of such explicit representations concerning it by LDH on behalf of all Defendants.

Defendants' Exhibit 1 Had A Material, Adverse Effect On Plaintiff's Case.

11. LDH advised the Court that the sole basis for admitting Defendants' Exhibit 1 was "this is just showing the fact that there was something in her file that was negative and she was hired." However, if, as Plaintiff was explicitly advised by OMH personnel, and as Plaintiff's trial attorney advised the Court at Trial, OMH personnel (1) *actively investigated* the allegations in Original Defendants' Exhibit 1, (2) received documentary evidence explicitly refuting its allegations and (3) attached such refuting items to that document, so that a single document *nullifying* any such allegations was thereby created *prior* to its view by any peer review groups at OMH, Original Defendants' Exhibit I would not have had *any* probative value whatsoever, even for the (claimed) limited proposition for which Defendants sought to admit it.

12. Original Defendants' Exhibit I was received by OMH in connection with Plaintiff's *privileges* application which actually *followed* her hiring by OMH: her Contract

with OMH was executed by OMH on June 16, 1992, and Original Defendants' Exhibit 1 was not received by OMH until after July 2, 1992, almost one month *after* the execution of the Contract. Accordingly, the totality of Original Defendants' Exhibit 1 *plus* any OMH-generated repudiating documents would have left the *completely different* (and correct) impression on the jury's mind: to-wit, that only because Plaintiff *had already been hired* at the time it received Original Defendants' Exhibit 1, OMH took extraordinary efforts to *review the veracity* of its contents and, on finding them to be false through documentary evidence, so prepared her file, and unqualifiedly granted her privileges, accordingly. Inasmuch as Jerry Johnson, OMH's administrator when Plaintiff was hired, testified at trial that, had Plaintiff had any negative references she would not have been hired at all, the presence of such a *refuting* document or documents in her file, whether or not attached to Original Defendants' Exhibit 1, would have been particularly probative of *Plaintiff's* position, not Original Defendants'. Original Defendants, through LDH, explicitly represented to the Court at the trial that no such refuting documents exist nor did any document in Plaintiff's file even *refer* to Original Defendants' Exhibit 1.

13. Original Defendants' Exhibit 1 contained extremely damaging accusations about Plaintiff, which were wholly untrue, as Defendants were well aware, including the accusation that her privileges had actually been *revoked for cause* at the hospital where she was working immediately before joining Defendant OMH's staff and that her skills were so deficient that she required monitoring at all times. The damage inflicted on

Plaintiff at trial by Original Defendants' Exhibit 1 was further exacerbated by Plaintiff being put in the position of having nakedly to deny its allegations, without the opportunity to show any contrary documents or other evidence, when cross-examined about it by Defendants' counsel.

14. Plaintiff proved her case at trial inasmuch as Original Defendants admitted all its central allegations (Original Defendants' attempted extortion) in this case on the witness stand, as follows:

> Q: (By Mr. Ribner) I am asking was your – were you conveying to her in that conversation of October 2, the concept that her references would be the same regardless whether she waived the fee?
>
> A: (By Defendant JBS) No, that was not the concept.
>
> Q: So the concept was that her references would be different if she waived the fee?
>
> A: Yes.
>
> Q: You admit that?
>
> A: Yes. Yes. Yes. Uh huh. Yes they would be.
>
> Q: Now that was not what you said at your deposition was it?
>
> A: I don't know. (Transcript of Record by Brenda Piles 523 ll. 5-17).

15. Original Defendants' Exhibit I was the *only* adverse document which Defendants were able to produce at trial, and inasmuch as it necessarily left (groundless) questions hanging in the jury's mind concerning the

Plaintiff, its admittance was almost certainly outcome-determinative. Had the Court *refused* to permit such document into evidence and had it nevertheless been shown to the jury, such would clearly have constituted a basis for a mistrial because of its highly prejudicial nature.

Defendants, Through LDH, Actively Refused To Permit Plaintiff Access To The File Of Which Defendants' Exhibit 1 Was Allegedly A Part.

16. Plaintiff's trial attorney in her Old Case described facts surrounding Defendants' Exhibit 1 to the Court at trial of which Plaintiff had advised him, which information she had received from both OMH's former hospital administrator and another person employed at OMH. That information was to the effect that false allegations in Defendants' Exhibit 1 were specifically and explicitly refuted by at least one other document in OMH's file, which other document or documents had actually been attached in some manner to Defendants' Exhibit 1 by OMH personnel (who may themselves have prepared one of such refuting documents) before any peer review group at OMH passed on Plaintiff's privileges, so that that other document or documents actually became a *part* of the original of Defendants' Exhibit 1 (Original Defendants only produced a *copy* of an alleged original of their Exhibit 1 at trial).

17. Original Defendants, through LDH, clearly and explicitly denied to the Court that any document refuting, or even referring to, Original Defendants' Exhibit 1 existed or that any such document had ever been attached in any manner to the original of Defendants'

Exhibit 1. It was only after LDH stated "there is nothing in the file of that nature [such as was described by Plaintiff's attorney and the Court]" that the Court indicated any willingness to permit the admittance of Original Defendants' Exhibit 1 under any circumstance.

18. LDH refused to bring to trial OMH's entire file regarding Plaintiff in which that document was allegedly a part, notwithstanding Plaintiff's attorney's explicit request to him to do so.

19. Because LDH refused to bring the file with him, Plaintiff and the Court were unable to test the truth and veracity of such representations on his part and it is clear from the record that the Court relied *exclusively* on her faith in LDH's truth and veracity, as an officer of the Court, of his representations, on behalf of Defendants, in permitting the admittance of that document.

If Any Of LDH's Representations Regarding Defendants' Exhibit 1 Were False, The Judgment On Plaintiff's Tort Claims Is Voidable Pursuant To 12 O.S. § 1031.

20. Because the admittance of Defendants' Exhibit 1 was probably outcome-determinative on Plaintiff's tort claims and because such admittance was procured by Original Defendants solely based on LDH's explicit representations to the Court concerning that document and the file, if *any* such representations were false, such would constitute a material fraud on the tribunal and on Plaintiff by all Defendants. In fact, all such representations by Defendants, through LDH, to the Court at trial concerning Original Defendants' Exhibit 1 were false and fraudulent and such misrepresentations were justifiably

relied on by Plaintiff and the Court in her ruling permitting the admittance of Original Defendants' Exhibit 1 which, in turn, resulted in the Court becoming an instrument of injustice which resulted in the jury finding for Defendants on Plaintiff's tort claims.

Original Defendants' Exhibit 1 Was A Key Part Of A Completely Fraudulent Case Original Defendants Presented To The Jury

21. Substantially all Original Defendants' case against Plaintiff at trial in her Old Case consisted of perjurious testimony by LDH, on Original Defendants' behalf, concerning Original Defendants' motives in actually sending damaging references regarding Plaintiff subsequent to their threats to do so, the introduction of Exhibit 1, a spoliated document, and attempts, through perjurious testimony, to lead the jury to believe that there were legitimate questions regarding the validity of Plaintiff's medical degree, about her competence and abilities as a physician and, accordingly, about her character, all with the intention of leading the jury to believe that Plaintiff could not be injured by the complained-of actions of Original Defendants and, accordingly, that her tort claims against them should be dismissed. Original Defendants' Exhibit 1 was a critical part of such case inasmuch as it was the only documentary "evidence" supporting such.

22. Specifically, at trial, Original Defendants, with the active collaboration of LDH and AKG&D, committed the following acts of spoliation and intrinsic fraud, in

addition to those described above, in presenting their case to the jury:

a. LDH testified as a witness that he had directed OMH personnel to prepare references to third parties solicited on behalf of Plaintiff, when such were requested of OMH, in a manner calculated seriously to injure her professional opportunities out of concerns, he claimed, that he had that she had obtained her medical degree fraudulently, and not as acts of malicious retaliation against Plaintiff for refusing to give in to Original Defendants' attempted extortion and for pursuing this lawsuit. On information and belief, such testimony by LDH regarding his and his clients' mental states and intentions in sending such references was materially false inasmuch as he well knew at trial that Plaintiff's medical degree was *not* obtained through any fraud and that the validity of such degree had been unquestionably re-confirmed to him by E.C.F.M.G., the authoritative body which certifies such degrees for all United States medical licensing boards, at least several weeks before he gave his trial testimony. Defendants offered *no* evidence besides such testimony of LDH in support of their claim that, in responding to reference requests regarding Plaintiff after her refusal to give in to Original Defendants' attempted extortion, they were doing anything other than following through on the threat contained in such extortion and retaliating against her in a malicious manner.

b. LDH testified that he had seen *no* documents confirming the unquestionable validity of

Plaintiff's medical degree prior to trial; on information and belief, such testimony was materially false.

c. LDH testified that the validity of Plaintiff's medical degree was being *actively investigated* by the Oklahoma Medical Licensing Board which, he claimed, had served OMH with a subpoena in pursuit of such investigation, that he and his clients had played no part whatsoever in instigating any such investigation, and that such investigation was continuing as of the time of trial. In fact, on information and belief, LDH knew at the time of trial that some or all of such testimony was materially false and perjurious.

d. Original Defendants, with the active collaboration of LDH, permitted the introduction of Original Defendants' Exhibit 1, allegedly as a complete, stand-alone document which had never been attached in any manner to any other document; in fact, Original Defendants' Exhibit I was a despoiled part of a much larger document which Defendant OMH's own Credentialing Committee had conclusively determined *disproved* the truth of any of the matters asserted in Original Defendants' Exhibit 1.

23. Original Defendants and their attorneys, LDH and AKG&D, have actively, fraudulently concealed all the spoliation and frauds perpetrated by them at trial, and prior thereto during discovery, up through the date of the filing of this Petition by, among other things, actively denying they ever committed any fraud at trial or during discovery, willfully withholding documents lawfully requested by Plaintiff pursuant to Oklahoma discovery procedures and actively misrepresenting to the Court

both the law and facts applicable to Plaintiff's Petition to Vacate a Portion of Judgment Pursuant to 12 O.S. § 1031 Fourth.

24. Any or all of the material misrepresentations described above made by Original Defendants through their attorneys LDH and AKG&D, together or individually, were probably relied on by the jury and so had a material, adverse effect on the outcome of Plaintiff's tort claims, resulting in the dismissal of such claims in her Old Case by the jury based on Defendants' extrinsic and intrinsic fraud described above.

FIRST CAUSE OF ACTION – PRIMA FACIE TORT – SPOLIATION

25. Plaintiff adopts and realleges all the preceding allegations and further pleads as follows:

26. All Defendants, acting in concert, willfully and maliciously took actions, described above, calculated to injure Plaintiff by making the jury believe falsehoods about the Plaintiff at trial, to obscure the truth concerning Plaintiff's case against the Original Defendants, in a successful attempt to destroy her claims for prima facie tort and intentional infliction of severe emotional distress against the Original Defendants through their fraud and spoliation, described above, thereby causing Plaintiff great mental and financial injury and causing irreparable harm to her resulting from the dismissal of such tort claims against the Original Defendants, in excess of $10,000.00.

28. Defendants engaged in attempts to manufacture "evidence", as described above, which, if believed, would tend to prove that Plaintiff was not damaged by them and that they never intended any injury to her. These activities have included obtaining and offering perjured testimony, offering a falsified document – Defendants' Exhibit I – to the jury, which actions, taken as a whole and individually, constitute acts of spoliation by Defendants, which acts have caused Plaintiff injury in excess of $10,000.00 by delaying and destroying her claims – her choses in action – against the Original Defendants.

SECOND CAUSE OF ACTION – FRAUD OR DECEIT

29. Plaintiff adopts and realleges all the preceding allegations and further pleads as follows:

30. Defendants, acting in concert, knowingly, willfully or recklessly made false representations of fact to the Court and jury in Plaintiff's Old Case against the Original Defendants, all as described above, and to Plaintiff, which representations Plaintiff, such Court and jury, reasonably relied on to their detriment resulting in grave injury to Plaintiff in excess of $10,000.00.

WHEREFORE, Plaintiff demands judgment against Defendants, and each of them, for their oppressive conduct, fraud, malicious and reckless disregard for the safety of Plaintiff and her career, and prays for damages as follows:

a. An amount in excess of $10,000.00 for each of the causes of action;

b. Punitive damages for Defendants' gross, wanton and willful behavior toward Plaintiff in an amount which will be sufficient to punish these Defendants and, by way of example, other similarly situated defendants, for their subversion of the judicial process in Plaintiff's Old Case; and

c. For the costs of this action and any other and further relief that the Court may deem just, equitable and proper.

Respectfully submitted,

/s/ Clifford N. Ribner
Clifford N. Ribner, OBA 7535
320 S. Boston, #825
Tulsa, OK 74103
(918) 582-9200
Attorney for Plaintiff

VERIFICATION

Urvashi B. Patel, being of legal age and sound mind hereby verifies that all facts and information contained herein are true and correct.

/s/ Urvashi B. Patel
Urvashi B. Patel

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

Subscribed and sworn to before me this 24 day of February, 1997.

/s/ Glenda D. Davis
Notary Public

My Commission Expires:

4-25-97

Supreme Court, U.S.
FILED
JAN 31 2000
CLERK

No. 99-1101

In The
Supreme Court of the United States

URVASHI B. PATEL, an individual,

Petitioner,

v.

OMH MEDICAL CENTER, INC., an Oklahoma corporation, ST. FRANCIS HOSPITAL, INC., an Oklahoma corporation, LARRY D. HENRY, an individual and ARRINGTON, KIHLE, GABERINO & DUNN, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

RESPONDENTS' BRIEF IN OPPOSITION

JOHN HENRY RULE
Counsel of Record
Gable & Gotwals
100 West Fifth Street
Tulsa, Oklahoma 74103
(918) 595-4800

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Court should review a claim that the Oklahoma Supreme Court violated Petitioner's right to equal protection of the laws in affirming the trial court's dismissal of her lawsuit, despite the fact that Petitioner failed to raise that issue in a timely manner in the Oklahoma courts.

2. If so, whether the Oklahoma Supreme Court violated the Petitioner's right to equal protection in upholding the trial court's dismissal of Petitioner's suit seeking damages for fraud or deceit and prima facie tort (spoliation of evidence) arising out of alleged misconduct during trial of a previous case on the grounds that under Oklahoma law such allegations failed to state a claim for which relief in tort can be granted.

PARTIES TO THE PROCEEDINGS

Petitioner, Urvashi B. Patel, was the plaintiff and appellant in the courts below.

Respondents, OMH Medical Center, Inc., Saint Francis Hospital, Inc., Larry D. Henry, and Arrington Kihle Gaberino & Dunn, Inc. were the defendants and appellees in the courts below. OMH Medical Center, Inc. is an Oklahoma not-for-profit corporation. Saint Francis Hospital, Inc., is an Oklahoma not-for-profit corporation. Arrington Kihle Gaberino & Dunn, Inc. was a professional corporation at the time Petitioner's suit was filed below.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

A. *"PATEL I"* 3

B. *"PATEL II"* 4

C. *"PATEL III"*: THE INSTANT CASE 5

D. THE OKLAHOMA SUPREME COURT'S DECISION 6

REASONS FOR DENYING THE PETITION 7

A. PATEL'S EQUAL PROTECTION CLAIM IS NOT REVIEWABLE 9

B. PATEL'S EQUAL PROTECTION CLAIM IS WITHOUT MERIT 11

C. THIS CASE DOES NOT IMPLICATE THE ADMINISTRATION OF JUSTICE IN THE STATE OF OKLAHOMA 16

D. THERE IS NO BASIS FOR GRANTING CERTIORARI 18

CONCLUSION 18

TABLE OF AUTHORITIES

Cases: **Page(s)**

Adams v. Robertson,
520 U.S. 83 (1997) 9

Bank of Oklahoma, N.A. v. Portis,
942 P.2d 249 (Okla. Ct. App. 1997) 15

Barrett v. Carter,
283 S.E.2d 609 (Ga. 1981) 14

City of Cleburne, Texas v. Cleburne Living Center,
473 U.S. 432 (1985) 12

Estate of Wilson v. Aiken Indus., Inc.
439 U.S. 877 (1978) 9

Greenberg v. Wolfberg,
890 P.2d 895 (Okla. 1994) 8, 15

New York City Transit Authority v. Beazer,
440 U.S. 568 (1979) 11

Nienstedt v. Wetzel,
651 P.2d 876 (Ariz. Ct. App. 1982) 15

Parker v. City of Midwest City,
850 P.2d 1065 (Okla. 1993) 14

PruneYard Shopping Center v. Robins,
447 U.S. 74 (1980) 9

Radio Station WOW, Inc. v. Johnson,
326 U.S. 120 (1945) 9

Richards v. Jefferson County, Ala.,
517 U.S. 793 (1996) 9

Vacco v. Quill, 521 U.S. 793 (1997). 11

Wall v. Cherrydale Farms, Inc.,
9 F. Supp. 2d 784 (E.D. Mich. 1998) 13, 14

Rules

Oklahoma Supreme Court Rule 1.36(g) 10

U.S. Supreme Court Rule 15.2 2

Statutes

OKLA. STAT. tit 12, § 1031 (1991) 17

OKLA. STAT. tit. 12, § 1031(4) (1991) 4

OKLA. STAT. tit. 12, § 2012(B)(6) (1991) 5

OKLA. STAT. tit. 12, § 990.2 (1991) 10

OKLA. STAT. tit. 21, § 575 (1991) 6

Other Authorities

Charles A. Wright et al., *Federal Practice and Procedure*
§ 4022 (2d ed. 1996) 9

Robert L. Stern et al., *Supreme Court Practice* 127 (7th ed. 1993) 9

STATEMENT OF JURISDICTION

As shown below, the Court lacks jurisdiction of this matter because Petitioner did not raise her equal protection argument until her petition for rehearing before the Oklahoma Supreme Court.

STATEMENT OF THE CASE

This case arises from the Oklahoma Supreme Court's affirmance of the trial court's dismissal of Petitioner's lawsuit against Respondents for failing to state a claim upon which relief could be granted. Petitioner sought damages for fraud or deceit and prima facie tort (spoliation of evidence) against corporate and individual defendants, as well as their counsel and law firm, for acts which allegedly occurred during a jury trial. However, Oklahoma law does not recognize a civil action for damages caused by perjury, fraud, or deceit, on the facts alleged by Petitioner. Oklahoma law likewise does not recognize spoliation of evidence or prima facie tort as an actionable claim. Accordingly, Petitioner's claims were dismissed by the trial court and that dismissal was affirmed on appeal.

Petitioner now argues that the Oklahoma Supreme Court's affirmance of the district court's dismissal of Petitioner's Petition violates the Equal Protection Clause because it purportedly deprives one class – plaintiffs – of a civil remedy for litigation misconduct while another class – defendants – have such remedies. Petitioner argues that defendants have access to two causes of action, malicious prosecution and abuse of process, to remedy litigation misconduct by plaintiffs, and that plaintiffs have no such causes of action to remedy litigation misconduct by defendants.

This case arises in the context of three separate state court lawsuits: *Patel I, Patel II* (which is the subject of a

separate Petition for Writ of Certiorari in this Court, Case No. 99-1079, in which Petitioner alleges that the decision of the Oklahoma Supreme Court violates her right to due process), and *Patel III* (this case).[1]

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[1] Respondents are aware of their obligation pursuant to Sup. Ct. R. 15.2 to address any misstatements of fact or law contained in Patel's Petition. However, Respondents respectfully submit that the Petition is so replete with misstatements, overstatements and exaggerations of fact and law that a complete recitation of those misrepresentations would cause Respondents to run afoul of this Court's requirement of brevity. Therefore, Respondents have included their own Statement of the Case, which implicitly refutes the misstatements in Patel's own such attempt. Further, the most egregious and important of Patel's misstatements are specifically addressed herein. An example of one of Patel's more blatant misrepresentations is her allegation that the Oklahoma Supreme Court did not even purport to disturb the trial court's "finding" of fraud in *Patel II*. Pet. 10. To the contrary, the supreme court clearly "disturbs" the finding by holding that the trial court abused its discretion in making such a finding without first conducting an evidentiary hearing. *See, e.g.*, Pet. App. 35a-36a. An additional example of an egregious misstatement is Patel's claim that the trial court in *Patel II* determined that the alleged fraud was committed intentionally. Pet. 6. In fact, the trial court made no finding that Respondents made any knowing or intentional misstatement. Resp. App. 1a-5a. Additionally, at page 4 of her Petition, Patel states "[t]he entire defense presented by Respondents to Petitioner's tort claims at the trial of Patel I consisted of perjurious testimony from LDH and AKG&D on behalf of all the Respondents in this case and documentary 'evidence' despoiled and/or manufactured by all such Respondents, with the active participation of such lawyers, admission of which was obtained only by such Respondents knowingly making material, false representations to Petitioner and Judge Wiseman on which they relied to their detriment. The jury's verdict adverse to plaintiff's tort claims resulted primarily, if not exclusively, from such fraudulent misconduct. . . ." Respondents deny the allegations against them, deny that "the entire defense" of Respondents was based on any of the matters which Patel alleges as constituting litigation misconduct, and further deny that the jury's verdict in *Patel I* resulted primarily or exclusively from the conduct alleged by Patel as constituting litigation misconduct. Also on page 4, Patel alleges that Respondents

A. *"PATEL I"*

Petitioner, Urvashi B. Patel ("Patel"), is a physician who was employed as an anesthesiologist by Respondent OMH Medical Center, Inc. ("OMH"). In October 1993, after months of discussions between OMH and Patel, OMH terminated Patel's employment contract by invoking the termination clause contained therein. OMH paid Patel the $50,000 contract termination fee, offset by the amount of the unearned portion of the medical malpractice insurance premium OMH had prepaid as part of Patel's compensation. In November 1993, Patel sued Respondents, alleging breach of contract and the torts of emotional distress, conversion, and prima facie tort. (She withdrew the claim for conversion at the pre-trial conference.) Patel alleged that Respondents attempted extortion by threatening to withhold letters of recommendation unless she waived her rights to the contract termination fee.

Patel alleged that OMH refused to provide her with anything but a neutral reference upon her termination from the hospital, which stated only her position and dates of employment at OMH. Patel's damages witness at trial testified that it would be all but impossible for Patel to find a good job with such a reference. Respondents then offered Exhibit 1 to

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threatened to ruin her medical career and attempted "extortion" through their negotiations over her termination fee. Respondents also dispute this characterization of events. Similarly, on page 5 of her Petition, Patel states that "[w]hile conducting discovery incident to such Petition to Vacate, Petitioner obtained documentary evidence unambiguously proving Respondents' fraud and evidentiary proof of additional, material frauds also committed by Respondents, also with the active participation of their attorneys." Respondents deny this contention as well.

rebut that testimony on the issue of damages by showing that Patel was in fact hired by OMH despite the fact that her file contained an unfavorable reference. Exhibit 1 was not introduced for the truth of the matters contained therein.

Exhibit 1 is a copy of a recommendation from Patel's previous employer, Scotland Memorial Hospital. The reference was issued in response to OMH's hiring-process inquiries about Patel's performance at Scotland Memorial, and is one of several personal and professional references in Patel's OMH credentialing file. The recommendation is unfavorable, stating that Patel's performance had been average to below average and recommending that she be monitored before being granted full medical privileges at OMH.

After a three-day jury trial, the jury returned a verdict awarding Patel $12,464 against OMH on her breach of contract claim, which represented the amount OMH set off against the termination fee for the prepaid malpractice insurance premiums. The jury found in favor of Respondents on the tort claims. Both parties appealed the verdict to the Oklahoma Court of Appeals, which affirmed the trial court. The Oklahoma Supreme Court denied Patel's Petition for Certiorari to review the Court of Appeals' decision. The judgment became final in July 1996.

B. *"PATEL II"*

In August 1996, Patel accepted from OMH the amount due upon the judgment in full payment and satisfaction thereof. Less than one month later, however, Patel filed a petition to vacate the adverse jury verdict on her tort claims pursuant to OKLA. STAT. tit. 12, § 1031(4) (1991). Patel alleged that Respondents and their counsel, Larry D. Henry, had made false representations to the court during the trial with respect to

Exhibit 1, and that the court relied upon such misrepresentations in admitting the exhibit. Patel further alleged that the admission of Exhibit 1 tainted the jury verdict because its unfavorable contents prejudiced the jury against Patel and because it falsely rebutted one of Patel's principal contentions at trial.

Respondents filed a motion to dismiss Patel's petition to vacate, which the trial court denied without oral argument, and Patel filed a motion for summary judgment. A specific ruling on the motion for summary judgment was never entered. However, on November 14, 1997, without having first conducted an evidentiary hearing on the issue of whether fraud occurred during the *Patel I* trial, the trial court vacated the judgment. Respondents appealed the trial court's order to the Oklahoma Supreme Court, which reversed and remanded the case for further proceedings. As noted above, that decision of the Oklahoma Supreme Court is the subject of a separate Petition for Writ of Certiorari filed by Patel.

C. "*PATEL III*": THE INSTANT CASE

In February 1997, while *Patel II* was pending in the trial court, Patel filed a third action, this one, against the defendants in *Patel I* and *Patel II*, as well as their attorney, Larry D. Henry, and his law firm, Arrington Kihle Gaberino & Dunn ("AKG&D"). Patel sought compensatory and punitive damages for acts of fraud, deceit and spoliation of evidence allegedly occurring during the *Patel I* trial. Respondents filed a motion to dismiss pursuant to OKLA. STAT. tit. 12, § 2012(B)(6) (1991), on the grounds that the petition failed to state a claim upon which relief could be granted. The trial court granted the motion and dismissed the case. Patel appealed to the Oklahoma Supreme Court.

D. THE OKLAHOMA SUPREME COURT'S DECISION

Although the Oklahoma Supreme Court did not formally consolidate the appeals from *Patel II* and *Patel III*, it considered the two appeals together and issued a single opinion disposing of both appeals, which was filed on April 27, 1999. The court affirmed the trial court's dismissal of Patel's petition in *Patel III* (against Respondents herein), and reversed and remanded the trial court's decision in *Patel II*.

The Oklahoma Supreme Court reviewed *de novo* the trial court's dismissal of Patel's action in *Patel III* to determine if, taking all of Patel's allegations as true, she was precluded from recovering as a matter of law. The court held that neither the Oklahoma Constitution, Oklahoma statutes, nor Oklahoma common law provides for civil damages for such claims of perjury, "whether denominated perjury, fraud, deceit, or 'prima facie tort'".[2] Pet. App. 39a. The court also declined to provide redress for alleged litigation-related misconduct through adoption of a new tort, stating that Patel has sufficient other remedies available to her. Pet. App. 39a-40a. Likewise, because Oklahoma does not recognize a claim for prima facie tort or spoliation of evidence, the court affirmed the trial court's dismissal of that claim. Pet. App. 40a. The court also declined to consider whether that tort should be recognized,

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[2] The court specifically rejected application of the civil remedy contemplated by the criminal statute, OKLA. STAT. tit. 21, § 575 (1991), as such civil remedy requires an antecedent criminal conviction which does not exist in this case. Pet. App. 37a n.61.

because the conduct of which Patel complained did not present a case of spoliation of evidence.[3] Pet. App. 40a.

Patel filed petitions for rehearing of the Oklahoma Supreme Court's decisions in both *Patel II* and *Patel III*. Patel raised her equal protection argument for the first time in her petition for rehearing in this case. Pet. 11. Both petitions were denied.

REASONS FOR DENYING THE PETITION

Nothing in this case warrants review by the Court. No federal statutes are implicated. No broad policy questions are at issue. No Supreme Court decisions are in "irreconcilable conflict" with the Oklahoma Supreme Court's decision in this case. Apart from a baseless equal protection claim that was not presented below, no constitutional questions are asserted.

Patel contends that the Oklahoma Supreme Court refused to consider the equal protection implications of its decision and failed to suggest any rational basis for doing so. Pet. 2. However, that issue was not before the Oklahoma court, as Patel failed to raise her claim until she petitioned for rehearing. Thus, Patel's equal protection argument should not be reviewed by this Court as the Oklahoma courts were not given a timely opportunity to address it.

However, even if Patel's Petition is subject to review, review should not be granted because Patel wholly fails to

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[3] "Spoliation" was defined in the Oklahoma Supreme Court's decision as "'[t]he destruction of evidence . . . .The destruction, or the significant and meaningful alteration of a document or instrument.'" Pet. App. 39a. The court determined that the misconduct alleged in *Patel III* did not consist of the destruction or alteration of a document. Pet. App. 40a.

present any equal protection issue. She contends that the Oklahoma Supreme Court's decision "barred" Patel and all other similarly situated plaintiffs from seeking redress for fraudulent misconduct committed by defendants, by "prophylactically immunizing defendants and their attorneys merely because of their status as such." Pet. 2. The decision of the Oklahoma Supreme Court has no such effect. That decision holds that there is no cause of action in Oklahoma for tort damages based simply on allegations of litigation misconduct – not for plaintiffs and not for defendants. In other words, this case simply does not present any equal protection issue because the Oklahoma Supreme Court's opinion does not treat plaintiffs differently from defendants.

Patel's position misinterprets the decision below and Oklahoma law. First, Patel's allegations of litigation misconduct against Respondents would not support a malicious prosecution or abuse of process action based upon Oklahoma law on the part either of a plaintiff or a defendant. Second, actions for abuse of process are equally open to both plaintiffs and defendants under Oklahoma law, upon assertion of facts supporting such claims, and nothing in *Patel III* holds otherwise. Rather, the limitations implicitly placed upon that cause of action by the Oklahoma Supreme Court's opinion – *i.e.*, implicitly excluding litigation misconduct as a basis for an abuse of process claim – are equally applicable to both plaintiffs and defendants. Finally, although malicious prosecution claims are inherently available only to defendants (or to plaintiffs as counter-defendants, *see Greenberg v. Wolfberg*, 890 P.2d 895, 901 n. 21 (Okla. 1994)) that presents no equal protection issue because *Patel III* does not recognize litigation misconduct as a basis for a malicious prosecution claim by *anyone*. Patel thus has no equal protection argument.

A. PATEL'S EQUAL PROTECTION CLAIM IS NOT REVIEWABLE

Patel's equal protection claim is not reviewable here because she did not raise that claim until her petition for rehearing before the Oklahoma Supreme Court. A federal claim raised for the first time in a petition for rehearing is not properly preserved for review by this Court when, as in this case, the state court does not rule on the claim in denying the petition for rehearing. *See Adams v. Robertson,* 520 U.S. 83, 89 n.3 (1997); *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120, 128 (1945); *see also* Robert L. Stern et al., *Supreme Court Practice* 127 (7th ed. 1993).[4]

The Court has recognized an exception to this rule for litigants with no opportunity to anticipate or press their federal claims prior to filing petitions for rehearing. *See Estate of Wilson v. Aiken Indus., Inc.* 439 U.S. 877, 879 (1978) (Blackmun, J., concurring in denial of certiorari); *see also* Stern et al., *supra*, at 129. However, the exception does not apply here. Patel had ample opportunity to anticipate and press any equal protection claim many times prior to her petition for rehearing. First, she had the opportunity in the trial court. There, Respondents filed a motion to dismiss for failure to state

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[4] Patel cites *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 85-86 n.9 (1980) and *Richards v. Jefferson County, Ala.,* 517 U.S. 793, 797-98 n.3 (1996) for the proposition that a constitutional argument is timely when raised in the petition for rehearing. However, in *PruneYard,* the Court explicitly noted that the constitutional question had been raised by the petitioner in the California Supreme Court. *Richards* relies exclusively on *PruneYard.* Therefore, these decisions are distinguishable from the situation in this case, where Petitioner was on notice at the trial court level of any alleged violation of her constitutional rights which she asserts now. *See* Charles A. Wright et al., *Federal Practice and Procedure* § 4022, at p. 332 n.27 (2d ed. 1996).

a claim. If Patel believed a ruling in Respondents' favor on that motion would violate the Equal Protection Clause, she could have raised her equal protection argument to the trial court in response to the motion to dismiss. Or she could have filed a motion for reconsideration with the trial court and raised it. *See* OKLA. STAT. tit. 12, § 990.2 (1991). Resp. App. 5a. She did neither.

Patel also did not raise the issue on appeal to the Oklahoma Supreme Court. Patel contends that she was precluded under Oklahoma's appellate rules of procedure from filing any briefs on appeal except the brief she had filed in the trial court. Pet. 10-11. It is true that Rule 1.36(g) of the Rules of the Oklahoma Supreme Court, Resp. App. 6a, provides that the court's appellate review of a trial court's order granting a motion to dismiss will be confined to the record presented to the trial court. However, the rule also authorizes a party to file a motion for leave to submit appellate briefs. Patel declined to seek leave to file an additional brief to raise the equal protection claim. However, she did file a "Supplemental Suggestion Regarding Clearly-Controlling Legal Authority Not Included By Either Party In Their Briefs, Due Solely To Inadvertence," in which she cited the criminal statute specifically rejected by the Oklahoma Supreme Court on appeal. Resp. App. 7a-10a. She did not raise an equal protection claim in that filing. Patel also filed a Motion to Retain Appeal in Supreme Court Pursuant to Rule 1.24, in which she requested the Oklahoma Supreme Court to retain the appeal for decision, rather than assigning it to the court of appeals for initial decision. Resp. App. 11a-15a. In that motion, she urged the supreme court to retain the appeal on three grounds, none of which included an equal protection claim. *Id.*

The Oklahoma Supreme Court retained the appeal, and then affirmed the trial court's decision. Nothing about the supreme court's affirmance created a previously-unavailable occasion or opportunity for Patel to present her equal protection argument, and when she raised the claim for the first time in her petition for rehearing, the Oklahoma Supreme Court denied the petition without comment. Pet. App. 46a. Thus, under well-established rules of this Court, Patel's failure to raise the equal protection claim below, despite having the opportunity to do so, defeats her efforts to raise the matter now, and the exception for litigants with no opportunity to anticipate or press their federal claims prior to filing a petition for rehearing clearly does not apply here.

B. PATEL'S EQUAL PROTECTION CLAIM IS WITHOUT MERIT

The Equal Protection Clause of the Fourteenth Amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Equal Protection Clause requires courts to "treat like cases alike" but also allows courts to "treat unlike cases accordingly." *Vacco v. Quill,* 521 U.S. 793, 799 (1997).

When an equal protection claim is asserted, a threshold issue is whether a governmental unit has adopted a rule that has a special impact on less than all of the people subject to its jurisdiction. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587-88 (1979). Only when there is unequal impact can there be an equal protection issue requiring analysis under this Court's equal protection jurisprudence.[5] Here, there is no

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[5] Under an equal protection analysis, a statute or rule of law is presumed to be valid, and will only be reviewed to determine if it violates

need for such an analysis because the Oklahoma Supreme Court's decision clearly does not impact plaintiffs as a class differently from defendants as a class.

Patel's equal protection argument turns on the false premise that the Oklahoma Supreme Court's decision denies plaintiffs as a class the right to legal remedies for litigation misconduct which are available to defendants as a class. The alleged litigation misconduct Patel refers to is: perjury, spoliation, manufactured evidence, misrepresentation, and fraud. Pet. 4. Patel cites two causes of action which she asserts are available to defendants, but not plaintiffs, to remedy litigation misconduct: (1) malicious prosecution and (2) abuse of process. Pet. 11.

Patel's premise for her equal protection argument is false because the Oklahoma Supreme Court's opinion does not distinguish between plaintiffs and defendants with respect to the remedies available to address litigation misconduct. The Oklahoma Supreme Court's decision in *Patel III* simply affirmed the trial court's ruling that Patel's allegations of litigation misconduct do not state a cause of action in Oklahoma. That is, under the Oklahoma Supreme Court's decision in *Patel III*, *neither* plaintiffs *nor* defendants are

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equal protection by considering whether it is "rationally related to a legitimate state interest," unless the law creates classifications based upon race, alienage, or national origin, and then it will be subject to strict scrutiny. *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). Patel does not allege a classification based upon race, alienage, or national origin. Therefore, if the Court were to reach an equal protection analysis, the proper test would be to consider whether Oklahoma's allegedly different treatment of plaintiffs and defendants is rationally related to a legitimate state interest. As pointed out in text, no such analysis is necessary here because Patel's premise that the state court decision impacts plaintiffs differently from defendants is simply incorrect.

entitled to bring a cause of action for litigation misconduct as alleged by Patel. The court did not say that such a cause of action is available to defendants but not to plaintiffs, or that such a claim could be brought in a malicious prosecution or abuse of process action, but only by defendants.

Nothing in the Oklahoma Supreme Court's opinion suggests that the court would recognize a cause of action for malicious prosecution, abuse of process, prima facie tort or otherwise based on Patel's allegations, if only they were brought by a defendant. Moreover, litigation misconduct is in fact not a basis for a malicious prosecution claim under Oklahoma law, and so the fact that malicious prosecution claims are available only to defendants (or plaintiffs as counter-defendants) raises no equal protection issue in this case.[6] Also,

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[6] Although it is not an issue in this case, since Patel's allegations do not support a malicious prosecution claim in any event, it is obvious that by recognizing a cause of action for malicious prosecution, the common law treats defendants differently from plaintiffs: plaintiffs simply have no such claim (except to the extent a case contains a counterclaim which meets the elements of malicious prosecution). Patel does not contend that this circumstance constitutes an equal protection violation and cites no case to that effect. In other contexts, courts have held that such differential treatment of plaintiffs and defendants does not violate the Equal Protection Clause because plaintiffs and defendants are not similarly situated. At least two courts have considered the argument that different treatment of "plaintiffs" as a class and "defendants" as a class violates equal protection. Both found no violation. In *Wall v. Cherrydale Farms, Inc.*, 9 F. Supp. 2d 784 (E.D. Mich. 1998), the plaintiff alleged that a Michigan statute which allows a jury to apportion fault, even against a nonparty (such as an employer exempt from liability due to workers compensation laws), violates equal protection in that it allows the defendant in a personal injury action to argue the fault of an absent actor, while the actor's very absence prejudices the plaintiff's ability to make out her claim against the defendant. In rejecting this argument, the trial court stated:

> [U]nder equal protection analysis, plaintiff has to identify "similarly situated" individuals from whom she is being

nothing in the Oklahoma court's decision suggests that abuse of process claims are available only to defendants. In other words, this case simply does not present any equal protection issue because the Oklahoma Supreme Court's opinion does not treat plaintiffs differently from defendants.

Patel's allegations would not support a malicious prosecution claim by *anyone*. In Oklahoma, a malicious prosecution action is made up of five elements: (1) the bringing of an original action; (2) its successful termination in favor of the defendant; (3) want of probable cause to bring the action; (4) malice; and (5) damages. *Parker v. City of Midwest City,* 850 P.2d 1065, 1067 (Okla. 1993). The purpose of a

---

> treated differently, and she has not done this . . . . Here, plaintiff does not explain how plaintiffs and defendants are similarly situated in the context of this statutory provision. I conclude that their interests are inapposite and that they are not similarly situated . . . . plaintiff's equal protection argument fails.

Id. at 788-89. Likewise, in *Barrett v. Carter,* 283 S.E.2d 609 (Ga. 1981), the court rejected an argument by plaintiff that state laws exempting from tort liability defendants under the age of thirteen, while allowing a defendant to defend a lawsuit by arguing the negligence of a plaintiff who is under thirteen, violates equal protection. The court stated:

> Both rules serve the public interest. While a defendant under 13 is protected by the one rule, the plaintiff under 13 is not allowed to ignore his or her lack of due care and recover damages from a defendant whose negligence is less than that of the plaintiff. Plaintiffs and defendants may be classified separately and treated differently for equal protection consideration.

Id. at 610 (citation omitted). Both cases recognize that the interests of plaintiffs and defendants will often differ, which justifies different treatment.

malicious prosecution action is to provide a remedy to a party against whom suit is brought or process is issued without probable cause. *See Greenberg v. Wolfberg*, 890 P.2d 895, 905 n.45 (Okla. 1994). Thus, no one would have a cause of action under Oklahoma law for malicious prosecution to remedy conduct such as that alleged by Patel, all of which purportedly took place during the litigation, rather than in its commencement.

Patel's allegations also do not form the basis for an abuse of process claim under Oklahoma law. An action for abuse of process requires: (1) the improper use of the court's process; (2) primarily for an ulterior or improper purpose; and (3) damage. *Bank of Oklahoma, N.A. v. Portis,* 942 P.2d 249, 255 (Okla. Ct. App. 1997). The litigation misconduct Patel alleges does not involve use of "process" as that concept is understood under Oklahoma law. In *Greenberg v. Wolfberg,* 890 P.2d 895 (Okla. 1994), the Oklahoma Supreme Court, in a footnote, states that "[t]he word 'process', as used in the tort of 'abuse of process', encompasses the entire range of *procedures* incident to the litigation process." *Id.* at 905 n.47 (emphasis added). The *Greenberg* court cites an Arizona case, *Nienstedt v. Wetzel,* 651 P.2d 876, 880 (Ariz. Ct. App. 1982). In *Nienstedt,* the court defines "process" to consist of "the noticing of depositions, the entry of defaults, and the utilization of various motions such as motions to compel production, for protective orders, for change of judge, for sanctions and for continuances." *Id.* at 880-81. Patel has made no allegations that Respondents' alleged misconduct involved the use of such processes. Therefore, it appears an action for abuse of process

would not lie under Oklahoma law for either a plaintiff or a defendant on facts such as those alleged by Patel here.[7]

Finally, as the Oklahoma court noted, many remedies are available for a party victimized by litigation misconduct, including vacation of the judgment with possible discovery or other sanctions in the reopened case if vacation is granted or, apart from the existing case, sanctions under the criminal law and bar disciplinary measures. Pet. App. 40a. Nothing in the Oklahoma Supreme Court's decision renders such remedies more available to defendants than to plaintiffs.

Thus, nothing in the Oklahoma Supreme Court's decision denying recognition of a remedy in tort for litigation misconduct as alleged by Patel distinguishes between plaintiffs and defendants and, accordingly, this case presents no equal protection issue.

C. THIS CASE DOES NOT IMPLICATE THE ADMINISTRATION OF JUSTICE IN THE STATE OF OKLAHOMA

Patel claims that "[t]he effect of [the Oklahoma Supreme] Court's decision in both [*Patel II* and *Patel III*] could hardly be more corrosive to the administration of justice in Oklahoma." Pet. 22. In support of this charge, Patel urges the

---

[7] The Oklahoma Supreme Court's opinion in this case appears to place a limitation upon the remedies available to a party harmed by the litigation misconduct of its opponent (which implicitly limits the circumstances under which an abuse of process claim may be brought), but that limit applies to plaintiffs and defendants alike. Moreover, even if such allegations constituted the basis for an abuse of process claim, nothing in the *Patel III* decision indicates such a claim could be brought only by defendants.

Court to believe that the decision of the Oklahoma Supreme Court will (1) eliminate the duty of attorneys to disclose any frauds of which they are aware; (2) preclude the imposition of sanctions or other remedies for fraud discovered after judgment has been entered, thus encouraging attorneys to wait until after judgment to disclose a fraud on the court; and (3) promote fraud and a "catch-me-if you-can" mentality. Pet. 22-23. Patel's "parade of horribles" mischaracterizes the Oklahoma Supreme Court's decision and disregards time-honored ethical, criminal and civil remedies that provide ample incentive for attorneys and parties to avoid any hint of fraudulent activity.

First, the Oklahoma Supreme Court did not hold, as Patel suggests, that a judgment may never be vacated pursuant to OKLA. STAT. tit 12, § 1031 (1991) for fraud in which an attorney participated. Rather, the court merely recognized certain criteria which must be met by a party seeking to vacate a judgment on grounds of fraud. Indeed, the Oklahoma court remanded *Patel II* (which sought vacation of the judgment in *Patel I*) for evidentiary hearing and Patel herself could still obtain a vacation of the judgment on remand if she sought a hearing and proved the factors set forth in the court's opinion.

Further, as pointed out above, the Oklahoma Supreme Court expressly notes in *Patel III* that a myriad of other sanctions and remedies for litigation misconduct are available without requiring the creation of a new tort:

> If [Patel] is successful in vacating the Patel I judgment, discovery or other sanctions for the defendants' litigation-related misconduct in the original case may, if warranted, be imposed in the reopened case. Apart from the remedies available within the existing case, a party aggrieved by litigation-related misconduct may

> seek to invoke sanctions available under the criminal law and, in the case of attorney misconduct, by bar disciplinary measures.

Pet. App. 40a. The court thus makes it clear that its decision does not create an open-season for litigation-related fraud or other misconduct.

D. THERE IS NO BASIS FOR GRANTING CERTIORARI

Patel's only basis for seeking review is her claim that the Oklahoma Supreme Court decision violates the Equal Protection Clause and conflicts with this Court's equal protection decisions.[8] As shown above, the Oklahoma Supreme Court decision does not discriminate between plaintiffs as a class and defendants as a class. Accordingly, this case presents no equal protection issue, and it is unnecessary to discuss the decisions of this Court cited by Patel. Suffice it to say that none of those cases remotely suggests that a state court's determination not to recognize a cause of action in tort based on alleged litigation misconduct violates the Equal Protection Clause. There being no equal protection issues here, there is no basis for granting Patel's Petition.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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[8] Much of Patel's Petition (Pet. 15-19) consists of argument, not about the Equal Protection Clause, but rather that the Oklahoma Supreme Court's decision departs from prior Oklahoma law and public policy. This is not true, but even if it were, that circumstance would create no equal protection issue and no occasion for review by this Court.

Respectfully submitted,

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Counsel for Respondents

Dated: January 28, 2000

APPENDIX

IN THE DISTRICT COURT IN AND
FOR TULSA COUNTY
STATE OF OKLAHOMA
Filed: November 14, 1997

URVASHI B. PATEL,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No.
	)	CJ 93-5291
OMH MEDICAL CENTER, INC., an Oklahoma corporation, ST. FRANCIS HOSPITAL, INC., an Oklahoma corporation, and JOHN B. STEVENS, an individual,	)	
	)	
Defendants.	)	

ORDER ON PLAINTIFF'S PETITION TO VACATE JUDGMENT IN PART

The Court has reviewed and considered the parties' submissions on Plaintiff's Petition to Vacate Judgment in Part, including their briefs, affidavits, exhibits, oral arguments, and case authority.

After review of the materials presented, the Court finds that the Plaintiff's Petition to Vacate Judgment in Part should be granted. The bench conference reported on pages 612-617 of the Trial Transcript of February 24, 1995, shows that Plaintiff's counsel voiced specific concerns about the existence in the Plaintiff's credentialing file of a notation from either Dr. Rush or Dr. Carter responding to a negative evaluation

[Defendant's Exhibit 1] sent by Dr. Matson at Scotland Memorial Hospital where Plaintiff was previously employed. It is clear from the statement by Plaintiff's counsel that he was inquiring about Defendant's Exhibit 1 not being the complete documentation on this negative reference.

The following discussion occurred in the bench conference:

> THE COURT: I want to know what the status of the file is because if there is something that pertains to this particular evaluation then I think Cliff is entitled to have that produced to show the general circumstances under which it was produced. So without the complete file, you know, I can't really tell that because I think you are entitled to get it in if it is not complete or if there is something in the file that explains this more in detail than he is entitled to get that in too.
>
> MR. HENRY: Judge, how could it be incomplete? Do you read anything in here that would indicate this is not complete? [Page 614, lines 13-24]...
>
> THE COURT: ...The point is not that this document [Defendant's Exhibit 1] is incomplete but that there may be something in the file that references this document that explains it or further modifies it in some respect. He [Plaintiff's counsel] is entitled to have that produced too because otherwise I think it leaves a false intention and remind the jury [*sic* -- should read "false impression in the minds of the jury"] in regard to instances if Doctor wrote back or something or somebody else wrote the specific reference to this evaluation form and submitted by -- I can't read this guy's name.

MR. RIBNER: Matson.

THE COURT: Matson. He is entitled to have that produced. It is not presenting us from being admirable [*sic* -- should read "preventing it from being admissible"], it is just that it may not be admitted in its current form. If it doesn't show it totally [*sic* -- "the totality"] of the circumstances under which it was.

THE COURT: Present is [*sic*] in the file.

MR. HENRY: *There is nothing in the file of that nature.* [Emphasis added.] There are contradictory references from that city. [Page 615, lines 3-20]

Mr. Henry made a specific representation to the Court that there was nothing in the file of the nature about which the Court was clearly concerned. This representation was, in fact, false, there being in the file a typed memorandum by Karen Legg, OMH's risk manager, who kept the credentialing files, regarding a call from Dr. Parkes at Scotland Memorial, a memorandum on this very point and falling squarely within the category sought by the Court. Dr. Parkes called specifically to refute Dr. Matson's negative reference and to explain the circumstances under which Dr. Matson criticized the Plaintiff's professional conduct, a negative evaluation which Dr. Parkes stated was "strictly of a personal nature" and constituted a "lack of professionalism on Dr. Matson's part." [Legg memorandum] Mr. Henry made the representation knowing that the Court was relying on it as a true representation of the state of the file which was known to Mr. Henry but not to Mr. Ribner or the Court.

If Mr. Henry had responded that there was something in the file of that nature, the Court would have required it to be produced or would have excluded Defendant's Exhibit 1 on the basis that its admission, absent the additional file material,

would mislead the jury on the exact point on which Mr. Henry offered it, that the presence of a negative reference in the file was no impediment to a doctor's future employment.

Mr. Henry's misrepresentation to the Court and opposing counsel constitutes grounds under 12 O.S. Section 1031(4) to vacate the judgment on Plaintiff's tort claims entered on the jury verdict.

Plaintiff's Motion to Amend the Petition to Vacate is rendered most by this decision and the Court will therefore not address the merits of that motion.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff's Petition to Vacate Judgment in Part is granted and the judgment entered March 22, 1995, on Plaintiff's tort claims is hereby vacated and set aside.

Dated: November 14, 1997

s/ Jane P. Wiseman
Jane P. Wiseman
District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 14th day of November, 1997, a true and correct copy of the foregoing was mailed with postage prepaid thereon to: Mr. Clifford N. Ribner, 406 South Boulder, Suite 800, Tulsa, Oklahoma 74103; and Ms. Vivian Hale and Mr. Larry D. Henry, Gable, Gotwals, Mock, Schwabe, Kihle, Gaberino, 100 West Fifth, Tulsa, Oklahoma 74103.

s/ Carla K. Sewell
Deputy Court Clerk

§ 990.2 Time for appeal—Effect of post-trial motions

A. Post-Trial Motions Filed Within Ten (10) Days. When a post-trial motion for a new trial, for judgment notwithstanding the verdict, or to correct, open, modify, vacate or reconsider a judgment, decree or final order, other than a motion involving costs, attorney's fees or interest, is filed within ten (10) days after the judgment, decree or final order is filed with the court clerk, an appeal shall not be commenced until an order disposing of the motion is filed with the court clerk. The unsuccessful party may then appeal from the order disposing of the motion within thirty (30) days after the date such order was filed. If the decision on the motion was against the moving party, the moving party may appeal from the judgment, decree or final order, from the ruling on the motion, or from both, in one appeal, within thirty (30) days after the filing of the order disposing of the motion. Successive appeals from the original judgment, decree or final order and the order disposing of the motion shall not be allowed.

RULE 1.36 ACCELERATED PROCEDURE FOR SUMMARY JUDGMENTS AND CERTAIN DISMISSALS

(g) Appellate Review and Briefs. The appellate court shall confine its review to the record actually presented to the trial court. Unless otherwise ordered by the appellate court, no briefs will be allowed on review. If briefs are ordered, the appellate court will prescribe a briefing schedule. Motions for leave to submit appellate briefs shall be deemed denied unless affirmatively granted by the court. No briefs shall be tendered by attachment to a motion for leave to brief, and the clerk shall not accept or file an appellate brief without prior leave of the court. A motion for appeal related attorney's fees must be made by motion prior to mandate. See Rule 1.14.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Urvashi B. Patel, Plaintiff-Appellant, vs. OMH Medical Center, Inc., an Oklahoma corporation, St. Francis Hospital, Inc., an Oklahoma corporation, Larry D. Henry, an individual and Arrington, Kihle, Gaberino & Dunn, Inc., Defendants-Appellees.	)	No. 89582

PLAINTIFF'S-APPELLANT'S SUPPLEMENTAL SUGGESTION REGARDING CLEARLY-CONTROLLING LEGAL AUTHORITY NOT INCLUDED BY EITHER PARTY IN THEIR BRIEFS, DUE SOLELY TO INADVERTENCE

Plaintiff-Appellant Dr. Urvashi Patel ("Plaintiff") hereby files this her Supplemental Suggestion Regarding Clearly-Controlling Legal Authority Not Included By Either Party In Their Briefs, Due Solely To Inadvertence, as follows:

This Court has, by Order, retained this appeal brought by Plaintiff from the Trial Court's judgment dismissing her claims against Defendants-Appellees ("Defendants"). The Trial Court determined such claims simply are not cognizable in Oklahoma. Such claims are, in essence, that all Defendants, including Larry D. Henry and Arrington Kihle et. al. -- who

were and remain attorneys for the remaining, non-lawyer Defendants -- committed grotesque acts of deception on Plaintiff and the Trial Court which resulted in the destruction of Plaintiff's case against such remaining Defendants. In the related case to this one, which Defendants have appealed and which this Court has also retained -- Appeal No. 90489 -- Judge Wiseman, on more than sufficient evidence, ruled that all the Defendants in the present case *in fact committed* a number of the acts of deceit on the Court and Plaintiff which are alleged in Plaintiff's Petition in this case.

Apparently central to the Trial Court's ruling in this case was the argument, advanced by Defendants below, that Oklahoma has some public policy precluding any civil liability for such otherwise clearly reprehensible, let alone tortious, misconduct as is alleged by Plaintiff. Plaintiff has consistently disputed any such notion.

This Court should be advised that, almost by happenstance, the undersigned recently stumbled upon a long-standing statute -- 21 O.S. 1910 §575 ("§575") -- which unmistakably and unambiguously negates *any* possibility that Oklahoma has *any* such public policy supporting civil immunity for any of the Defendants herein. Indeed, §575 unmistakably requires this Court to reverse the Trial Court's dismissal of Plaintiff's claims herein. It has not previously been briefed herein by any of the parties, no doubt due solely to inadvertence.

§575 *expressly imposes* civil liability equal to *treble* damages on every attorney who "is guilty of any deceit…with intent to deceive the Court or any party…" Such is *precisely* what is alleged against *all* the Defendants -- attorneys and non-attorneys alike -- in this case. Although §575 may *appear* applicable only to attorneys, Title 21's general principle of accomplice liability *necessarily extends its reach* to non-lawyers as well. This is because, pursuant to 21 O.S. 1910

§172, the *remaining*, non-lawyer Defendants in this case, as the result of acting in *concert* with Mr. Henry and his law firm in the complained-of acts of deceit on the Court and Plaintiff, constitute *additional* principals, *equally* culpable, under 21 O.S. §575, as co-conspirators, with their lawyers. *Nothing* in 21 O.S. §575 purports to immunize non-lawyer accomplices from this usual rule of accomplice liability.

Moreover, Oklahoma has long imposed joint liability on aiders and abettors for all civil purposes. *See* Restatement (Second) of Torts §§875 and 876, *based on*, as stated in the Appendix thereto, *Keel v. Hainline,* 331 P.2d 397 (Okla. 1958) (Aiders and abettors fully liable for principal's torts.) *See* also *Rodebush v. Okla. Nursing Homes, Ltd.,* 867 P.2d 1241 (Okla. 1993) (Respondeat superior liability for actual and punitive damages for agent-employee's intentional tort imposed on principal). In this case it is indisputable that the lawyer Defendants were at all times the agents of the other Defendants.

21 O.S. 1910 §131 makes clear that the fact that §575 provides for a *specific* (treble damages) remedy against attorneys for such acts of deceit should in no way preclude *additional,* civil or criminal remedies against both such attorneys and their accomplices, (i.e., that statute makes the maxim "expressio unius est exclusio alterius" *inapplicable*).

Accordingly, not only does Oklahoma have *no* public policy of immunity applicable to any of the Defendants for their complained-of misconduct involved in this case, long-standing, clearly-legislated Oklahoma public policy is, rather, *precisely the opposite* and *expressly requires* that Defendants not only compensate Plaintiff for their grotesque misconduct but also that they do so many times over and be subjected to whatever additional punitive sanctions and remedies the Trial Court and, ultimately, a jury, may deem sufficient.

The additional statutes discussed in this supplement leave no doubt that the judgment of Judge Peterson involved in this appeal must be reversed as directly contrary to long-standing Oklahoma law.

Respectfully submitted,

s/ Clifford N. Ribner

Clifford N. Ribner, OBA No. 7535
320 South Boston Avenue, Suite 825
Tulsa, Oklahoma 74103
(918) 582-9200

Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I, Clifford N. Ribner, hereby certify that on the 20 day of July, 1998, caused a true and correct copy of the above and foregoing document to be deposited in the United States Mail to:

James M. Sturdivant
Larry D. Henry
Gable Gotwals et al.
1000 OneOk Plaza
Tulsa, Oklahoma 74103

Tulsa County Court Clerk
Tulsa County Courthouse
500 South Denver
Tulsa, Oklahoma 74103

with first class postage properly affixed thereon.

s/ Clifford N. Ribner

Clifford N. Ribner

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Urvashi B. Patel, Plaintiff-Appellant, vs. OMH Medical Center, Inc., an Oklahoma corporation, St. Francis Hospital, Inc., an Oklahoma corporation, Larry D. Henry, an individual and Arrington, Kihle, Gaberino & Dunn, Inc., Defendants-Appellees.	)	No. 89582

MOTION TO RETAIN APPEAL IN SUPREME COURT PURSUANT TO RULE 1.24

Plaintiff-Appellant Urvashi B. Patel hereby files this her Motion to Retain Appeal in Supreme Court Pursuant to Rule 1.24 of the Supreme Court Rules. This appeal should be retained both because the issues raised in this appeal (1) involve an area of law undecided in Oklahoma and (2) concern matters which will affect public policy and any decision is likely to have widespread impact. Such issues relate to the integrity of judicial proceedings and to actions by parties and attorneys during the course of such proceedings.

Specifically, this case raises the following issues:

1. Does a party defendant and/or its trial attorneys, such as all the Defendants-Appellees in this case, enjoy an

absolute immunity from all claims arising out of their conduct at trial, including their knowing procurement of false testimony, fraudulently manufactured documents and/or fraudulent representations to the trial judge made by them in an effort to obtain the admission of such false "evidence", notwithstanding the fact that such false "evidence" results in the destruction of the plaintiff's lawsuit for damages -- her chose in action -- against such defendant?

2. Does Oklahoma recognize an action for money damages, such as Plaintiff Dr. Urvashi Patel has brought here against the Defendants herein, arising out of the claim that an adverse party in a lawsuit prevailed at trial primarily by knowingly presenting despoiled and/or fraudulently manufactured "evidence" and/or perjurious testimony, uttered by the party and/or its trial attorneys, either from the witness stand, or separately to the trial judge, or both, all with the active complicity of such party's lawyers, as a species of prima facie or indeterminate tort?

3. Does Oklahoma recognize an action for money damages, such as Plaintiff Dr. Urvashi Patel has brought here against the Defendants herein, arising out of the claim that an adverse party in a lawsuit prevailed at trial primarily by knowingly presenting despoiled and/or fraudulently manufactured "evidence" and/or perjurious testimony, uttered by the party and/or its trial attorneys, either from the witness stand, or separately to the trial judge, or both, all with the active complicity of such party's lawyers, as a species of fraud?

The Oklahoma Supreme Court has not yet specifically ruled on whether it recognizes an independent tort of spoliation

-- that is, the intentional destruction, defacement or fabrication of evidence. Courts in Alaska, Ohio, California, New Jersey and Illinois have explicitly recognized the intentional or reckless spoliation of evidence as a separate, new tort. *Hazen v. Municipality of Anchorage,* 718 P.2d 456 (Alaska 1986); *Smith v. Howard Johnson Company,* 67 Ohio St. 3rd 28, 615 N.E. 2d 1037 (1993); *Smith v. Superior Court,* 151 Cal. App. 3rd 491, 198 Cal. Rptr. 829 (1984); *Viviano v. CBS, Inc.,* 251 N.J.Super. 113, 597 A.2d 543 (1991); *Boyd v. Travelers Insurance Company,* 166 Ill.2d 188, 652 N.E. 2d 267 (Ill. 1995).

As the United States Circuit Court of Appeals for the Tenth Circuit noted in *Merrick v. Northern Natural Gas Co.,* 911 F.2d 426 (10th Cir. 1990), prima facie, or indeterminate, tort pursuant to Restatement (Second) §870 "has been adopted in only a handful of states, *including Oklahoma*...(Emphasis added)" 911 F2d at 433. That Restatement section recognizes as tortious any unjustified, intentional act which causes harm to another.

Numerous Oklahoma cases, have long stood for the proposition that the legal principle advanced by Restatement §870 is indeed Oklahoma law. *Mangum Electric Co. v. Border,* 222 P. 1002, 101 Okla. 64 (Okla. 1924); *Panther v. McKnight,* 256 P. 916, 125 Okla. 134 (1927); *Stebbins v. Edwards,* 101 Okla. 188, 224 P. 714 (1924); *Hibbard v. Holiday,* 58 Okla. 244, 158 P. 1158 (1916); *Schonwald v. Ragains,* 32 Okla. 223, 122 P.203 (1912). Under this unbroken, and unrepealed, line of authority, absent some special privilege for the Defendants-Appellees, the facts alleged in the Petition should be cognizable as tortious under Oklahoma law. Nevertheless, the Trial Judge in this case apparently believed that language in *Cooper v. Parker-Hughey,* 894 P.2d 1096 (Okla 1995), precluded such result, notwithstanding that case's clearly distinguishable facts.

The issues involved in this appeal were the subject of a recent, scholarly article in the Oklahoma Bar Journal - Margaret A. Nunnery, *Evidence Destruction: Civil Liability for Spoliation in Oklahoma,* 68 OBJ #13 at p. 1057 (Mar. 29, 1997), which specifically noted their importance and unresolved state. The importance of such issues to the administration of justice in this State and to the public's image of the bar and the Courts is self-evident.

In dismissing Plaintiff's claims, the Trial Judge ruled that attorneys and parties enjoy an absolute, prophylactic immunity from liability for even such grotesque criminal and ethical violations as are alleged in the Petition in this case, as a matter of public policy. If there is such a public policy, what is its basis in logic or morals? Such issues clearly require resolution by the Supreme Court alone. Whether this Court agrees with the Trial Court's view, or finds it repugnant, it is imperative that this Court's opinion on these matters be known at the earliest possible date.

This case raises these issues with crystal clarity inasmuch as it involves extreme allegations against both parties defendant and their attorneys, all arising from the simplest, though well-briefed, record possible (the granting of a motion to dismiss). Accordingly, it would be difficult to imagine a more perfect case for this Court to consider these gravely important issues.

The undersigned has contacted Defendants and they have stated they have no objection to this Motion.

Respectfully submitted,

s/ Clifford N. Ribner

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320 South Boston, Suite 825
Tulsa, OK 74103
(918) 582-9200

Attorney for Plaintiff-Appellant

CERTIFICATE OF MAILING TO ALL PARTIES AND COURT CLERK

I, hereby certify that a true and correct copy of the above and foregoing instrument was mailed this 16 day of June, 1997, to:

James M. Sturdivant
Larry D. Henry
Gable, Gotwals, et al.
100 W. Fifth, Suite 1000
Tulsa, OK 74013

by depositing in the U.S. Mails, postage prepaid.

I further certify that a true and correct copy of the above and foregoing instrument was mailed to, or filed in, the Office of the Tulsa County Court Clerk on the 16 day of June, 1997.

s/ Clifford N. Ribner

Clifford N. Ribner

Supreme Court, U.S.
FILED
FEB 14 2000
CLERK

(3)

No. 99-1101

In The

Supreme Court of the United States

URVASHI B. PATEL, an individual,

Petitioner,

v.

OMH MEDICAL CENTER, INC., an Oklahoma corporation, ST. FRANCIS HOSPITAL, INC., an Oklahoma corporation and LARRY D. HENRY, an individual and ARRINGTON, KIHLE, GABERINO & DUNN, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Oklahoma

PETITIONER'S REPLY BRIEF

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788

QUESTION PRESENTED FOR REVIEW

I. Was Petitioner deprived of her constitutional right to the equal protection of the laws when the Oklahoma Supreme Court declared that the Respondents in this case were legally entitled to prophylatic immunity from liability to Petitioner for having committed, in concert, extreme acts of fraudulent litigational misconduct in another lawsuit in which Petitioner was the plaintiff and Respondents were the defendants and their attorneys (which misconduct included the intentional fabrication and spoliation of evidence, perjury, defrauding Petitioner, the Trial Judge and the jury therein, on which fraud Petitioner, the Trial Judge and the jury each relied to their detriment) resulting in the destruction of Plaintiff's property – her legal claims against such defendants – all of which attorney-complicit fraudulent misconduct was engaged in by Respondents as their sole defense to plaintiff's claims against them, whereas identical and even substantially less egregious, litigational misconduct has long been actionable in Oklahoma if committed by a plaintiff against a defendant, with the Oklahoma Supreme Court offering no rational basis for such differential treatment of defendants, as opposed to plaintiffs?

PARTIES TO THE PROCEEDING

Petitioner, Urvashi B. Patel, was the Plaintiff and the Appellee in the Courts below.

Respondents, OMH Medical Center, Inc., St. Francis Hospital, Inc., and Larry D. Henry and Arrington, Kihle, Gaberino & Dunn, Inc., were the Defendants and the Appellants in the Courts below. Subsequent to the commencement of this action, Respondent Arrington, Kihle, Gaberino & Dunn, Inc., merged into and changed its name to Gable & Gotwals.

There are no other parties to this action.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iii

PETITIONER'S REPLY BRIEF 1

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

TABLE OF AUTHORITIES

FEDERAL RULES OF CIVIL PROCEDURE

Federal Rule of Civil Procedure 12(b)(6) 2

OTHER AUTHORITIES

14 Martindale-Hubbell Law Directory 2000 OK188B, OK233B 1

PETITIONER'S REPLY BRIEF

Petitioner, Dr. Urvashi B. Patel, hereby submits this Reply Brief under S. Ct. R. 15 to address arguments first raised in the Respondents' Brief in Opposition.

STATEMENT OF JURISDICTION

Respondents dispute this Court's jurisdiction here on grounds fully addressed in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Respondents fail to advise this Court of the fact that their Counsel of Record's law firm – Gable & Gotwals – is, in fact, one of the Respondents themselves – Arrington, Kihle, Gaberino & Dunn, Inc. – operating under a changed name, in which Respondent Larry D. Henry remains a member. 14 Martindale-Hubbell Law Directory 2000 OK188B, OK233B. Accordingly, Respondents' Counsel is not, as it intimates, independent, but rather is directly interested as a principal in both this case and Patel II.

Respondents attempt to misrepresent the record in this case, including the Oklahoma Supreme Court's Opinion herein. Respondents claim that the Oklahoma Supreme Court "disturbed" the Trial Court's finding of their attorney-complicit fraud in *Patel II*. As shown in Petitioner's Reply Brief in *Patel II*, filed on even date herewith, such claim is textually unsupportable: *See* ¶ 48

of the Oklahoma Supreme Court's Opinion (Pet. App. 40a-41a), unmentioned in Respondents' Brief, where alone in its Opinion that Court specifically describes the questions it mandates for the Trial Court's determination on remand, which notably do not include the question of attorney-complicit fraud itself, which that Court implicitly assumed was already proven and, accordingly, did not "disturb."

Respondents attempt to misrepresent the magnitude of the allegations in this case contained in Petitioner's original pleading, which allegations this Court must take to be true since, as Respondents do not dispute, such Petition was dismissed under an Oklahoma statute interpreted identically to Federal Rule of Civil Procedure 12(b)(6).

Respondents also pretend that Judge Wiseman, the Trial Court Judge in *Patel II*, did not find their attorney-complicit fraud to be knowing and deliberate. Her Opinion, together with the facts on which it is based, could hardly be clearer in this regard, as discussed in Petitioner's Reply Brief in *Patel II*.

Respondents' willfulness in their fraud is also graphically proven to this Court both by the fact that they never corrected it and their continued denials, here and in *Patel II*, in the face of literally undeniable evidence to the contrary and the findings of the Oklahoma Courts, that they indeed engaged in the deceit Judge Wiseman ruled on, as also discussed in Petitioner's Reply Brief in *Patel II*. The Oklahoma Supreme Court's Opinion here

and in *Patel II* rewards all such misconduct, a result this Court must in all respects reverse.

Respectfully submitted,

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